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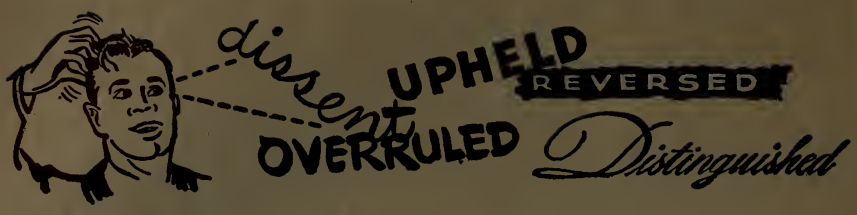

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MAGNA CARTA

*John W. Kyle**

I

Magna Carta was issued by King John in 1215. Four originals of the Charter are still in existence. Two of these are in the British Museum. The other sealed copies belong to the cathedrals of Lincoln and Salisbury. In its original form the text of the Charter was not divided into articles or chapters, but, in later time, a division of this kind of adopted; and the Charter, as now dealt with by commentators, is divided into sixty-three articles or chapters The Charter was issued by John as King of England, Lord of Ireland, Duke of Normandy and Aquitaine, Count of Anjou, and in its preamble the statement is made that the King has granted the Charter on the advice of the Archbishop of Canterbury and other prelates, who are named, the Papal Legate, Pandulf, and William Marshall, Earl of Pembroke, and other barons, some of whom are mentioned by name. Although drawn up in the form of a royal grant, the Charter was in reality a treaty between the king and his subjects.

In this article I shall not undertake to discuss in detail all of the grievances for which the barons demanded redress when they met the envoys of the king for the purpose of discussing a settlement during the month of June, 1215. But I shall undertake to give a brief outline of the historical events which led up to the baronial revolt and to show the constitutional basis of the demands which the barons had resolved to compel the king to accept. I shall then give a summary of the provisions of the Charter itself, with a few comments upon the historical importance of the instrument.

II

John's father, Henry the Second, was the first and perhaps the ablest of the Angevin line of kings who ruled England for more than three centuries. Henry mounted the throne in 1154. He was twenty-one years of age at that time and possessed of a strong mind and body. He realized that his first task as king was to restore order in his distracted kingdom, and he lost no time in bringing to an end the political turmoil that had

*Associate Justice of the Supreme Court of Mississippi.

produced such widespread confusion during the reign of his predecessor. After almost two decades of feudal anarchy under Stephen, the English people were willing to submit to the rule of a strong prince who was able and willing to expel the foreign soldiers from the kingdom, demolish the castles of the unruly nobles and reestabish the orderly system of government which had been developed by Henry the First. Henry lost no time in compelling the surrender of castles which had been erected by the great barons of Stephen's reign and in exacting new oaths of allegiance of the great barons of the north and west who were disposed to resist the king's demands for the surrender of the royal strongholds. Within the space of a year he succeeded in reestablishing the orderly functions of government in all parts of the country. He then set about reorganizing the finances and strengthening the powers of the king's courts. He divided the kingdom in six circuit districts for the holding of the king's courts, and assigned to each of these districts three itinerant judges. He abolished all feudal exemptions from the royal jurisdiction; and, as a check upon judicial corruption, he created a right of appeal from the decision of the judges to the king himself in council. From this right of appeal to the king in council, there were later developed the judicial powers of the privy council and the equity jurisdiction of the chancellor. Under the guidance of the great justiciar, Ranulf de Glanvill, who was appointed Chief Justiciar in 1180, the king carried out a well reasoned plan of legal reforms, under which the king's writ was made available for the enforcement of legal rights of all kinds in the king's courts. Under the new system of court procedure, justice could be administered by the king's courts among all classes of people, and the royal revenues could be collected with efficiency.

Henry the Second died in 1189 and left his son Richard, John's elder brother, the lordship of a vast empire that stretched from the southern boundary of Scotland to the Pyrenees. Henry also left his son a well ordered civil administration, under which the royal authority during Henry's reign had been made effective throughout the length and breadth of his English kingdom, and as a result of which the king's feudal rights in Normandy and Aquitaine had been maintained without serious challenge. Richard, however, lacked the qualities of a statesman which his father possessed. Although born at Oxford, Richard had spent most of his life in Normandy and Aquitaine; and when he visited England in the autumn of 1189 for his crowning, he had little personal knowledge of the realm which he was called upon to rule. Richard was a soldier and his chief interest in life was centered upon military operations. He spent only enough time in England to raise money for the Crusade which he was about to undertake. He then returned to Normandy and left the government of his Island Kingdom to be administered by a regency. He

visited England again in 1194, after his return from captivity in Germany, but he remained only a few weeks in England. He returned to Normandy in the early summer, and the remaining years of his life were spent in his continental dominions. Hubert Walter, the Archbishop of Canterbury, was appointed Justiciar at Christmas in 1193 and conducted the administration for the king until a short time before Richard's death. Richard's personal authority was seldom asserted except in support of his demands for new subsidies to be used in paying for the defense of his feudal dominions on the continent.

Richard was a brave soldier and a capable military leader. But he was profuse in his planning of military operations and rapacious in his demands for money. He was fortunate in having at his command a justiciar who was one of the most capable administrators of his time. Hubert Walter was both resourceful and courageous in handling the financial problems with which he had to deal. To meet Richard's constant demands for money the justiciar was compelled to invent new methods of taxation; and, to help pay the cost of Richard's ransom, he levied a tax on personal property. In 1198, at the king's command, he ordered the collection of a carucage of five shillings on each hundred acres of cultivatable land. This was the last official act that Hubert performed as justiciar. Hubert resigned in July, 1198, and Richard died on the 6th day of April, 1199.

III

John came to the throne in 1199, not by clear hereditary right, but as the choice of the English magnates who were in control of the government when his brother died. John was acknowledged as king in England and as duke in Normandy. His authority in Aquitaine was secured for him by his mother. But Anjou, Maine and Touraine did homage to Arthur, the son of John's elder brother, Geoffrey, the late Duke of Brittany. The history of John's reign is in large part a history of his crimes, his follies and his misfortunes. John was in France at the time of Richard's death, and he remained in France six weeks after Richard's death for the purpose of making good his hold on Normandy. He crossed over into England during the latter part of May and was crowned in London on the twenty-seventh of that month. John then returned to Normandy for the purpose of defending his rights against the claims of Arthur of Brittany. He was in England again during the months of March and April of 1200, and at that time ordered the collection of a carucage of three shillings on the hide from his English subjects. A scutage of two marks had been taken only a short time before. William Stubbs, in his "Constitutional History of England," says that both of these exactions were in excess of the usual rate, and they seem to have been collected under edicts sent out by the justices. John's difficulties on the continent

continued to increase. In 1202 he became involved in a quarrel with the barons of Poictou, and during the following year he was accused of instigating the murder of his nephew, Arthur of Brittany, and was summoned to be tried by a feudal court on that charge. John refused to answer the summons, and the French king took military action to enforce the sentence of the court. John possessed neither the energy nor the military skill that was needed to resist the power of the king of France, and his Norman barons showed little interest in trying to maintain his fight against the French king. By midsummer of 1204 Philip was in control of the whole of Normandy, Maine, Anjou and Touraine. Within five years after his accession to the English crown John had lost his continental dominions.

The failure of John's military operations in France made the king's task more difficult at home. The war had been fought at the expense of the English taxpayers. Heavy taxes had been imposed for the support of the mercenary troops. Heavy fines had been collected from the English barons for failure to render the military service which the king had demanded of them. The baronage with which John had to deal were unlike the baronage of the Conquest. Although many of them were of Norman-French descent, the barons of John's time were Englishmen at heart. Most of them owned no landed estates in Normandy, or in any other of John's continental dominions; and they were ill-disposed to accede to the king's demands that they continue to render military service in the continental wars in which the king was engaged by virtue of his feudal relationship to the king of France.

John's position was further weakened during the mdidle years of his reign by the bitter quarrel in which he became involved with the Church and the English clergy. Hubert Walter, the Archbishop of Canterbury, died in 1205. A controversy arose over the election of a successor to the archbishop. The rival claimants appealed to Rome, and, after a full hearing of the matter, Innocent III quashed the elections of both claimants and commanded the monks to elect Stephen Langton as archbishop. Notwithstanding the eminent worth of the man whom the Pope had recommended and the monks had elected, John refused the royal assent to Langton's election. But Langton was consecrated archbishop by Innocent III, and the Pope threatened the English realm with an interdict if Langton were excluded from his see. John still refused to receive the new archbishop, and in March, 1208, the kingdom was placed under an interdict. In answer to the interdict John ordered the seizure of the properties of the clergy. Several of the bishops fled from the kingdom. The king ordered the revenues from the Church properties to be impounded, and after subsistence allowances had been made out of the revenues for the support of the clergy the balance of the funds were used for military purposes. John's contest with the Papacy continued until 1213 and ended with

his complete discomfiture. John found that it was necessary that he make peace with the Church, and on May 15, 1215, John submitted to the demands of the Pope, accepted Stephen Langton as archbishop, and agreed to repay to the clergy the money that he had taken from them.

In 1214 John went abroad for the purpose of trying to regain his French possessions and remained abroad until October. He rallied the nobles of Poictou around him, and for time it appeared that, with the aid of his continental allies, he might win back the homeland of his ancestors. But in July his allies sustained a heavy defeat, his Poictevin nobles deserted him, and he was forced to return to England in October humiliated and defeated. The king was in an ugly mood when he returned from the continent. Many of his northern barons had refused to accompany him to Poictou. Stubbs says that it is more than doubtful whether he had a right to take them with him. But aside from this John had many enemies among the greater barons; and he had few loyal supporters outside of the official circle. John was untrustworthy and cruel by nature. The barons feared him, and their fears were well-founded. They had personal knowledge of his cruel treatment of the family of William de Briouse. They suspected, and indeed many of them believed, that he had murdered his nephew, Arthur of Brittany.

The barons knew the temper of the king and many of them were forewarned of his purpose to have a reckoning with them because of their failure to support him in his efforts to regain his continental possessions. And under the pretense of a pilgrimage to St. Edmundsbury a group of the barons from the northern and eastern counties held a meeting at that place during the early winter for the purpose of taking concerted action. They were determined to bear no longer with the king's oppressions, and at that meeting they resolved that, if the king refused to restore their liberties, they would make war on him till he confirmed them by charter under the king's seal. They planned to lay their demands before the king immediately after Christmas, and in the meantime to raise a military force to be used in backing up their demands if necessary. In January the barons presented their demands to the king. The king procrastinated and played for time. He demanded new oaths of allegiance from his tenants-in-chief, and in February took the vow of a Crusader. But the nation had been aroused by the king's tyranny, the excessive taxation that had been imposed upon them for the support of his foreign wars, and the confiscation of the revenues of the Church; and the insurgent barons pressed their demands. They collected an army and in April marched to Brackley in Northamptonshire, where they encamped on the 27th day of that month.

The king, who was then at Oxford, sent Stephen Langton, the Archbishop of Canterbury, and William Marshall to receive their demands. A long list of demands was presented, which the king promptly refused. The barons then elected Robert Fitz-Walter as their leader and on the 24th of May occupied London. Stephen Langton and the papal legate, Earl Ranulf and William Marshall advised the king to accept the demands that were being made of him. But Peter des Roches, the new justiciar, a Poictevin noble, counseled their rejection. John had great difficulty in making up his mind; but he finally decided to make a temporary peace with the barons and to issue the Charter, relying on the Pope to release him from the obligations of acceptance as soon as the immediate pressure was removed. On the 27th of May John authorized Stephen Langton to arrange a truce, and on the 15th of June John met his rebellious barons in the meadow at Runnymeade, a few miles west of London, to effect a settlement. The Charter was actually signed three or four days later.

The Charter itself furnishes ample evidence of the basic principles of the settlement which the barons had determined that the king should be required to accept, if he would have peace with his rebellious subjects. The basic principles of that settlement were four in number: (1) The principle that the English monarchy was not an absolute monarchy, and that the powers of the king were limited by the laws and customs of the realm; (2) the principle that the king and his ministers must govern according to the laws and customs of the realm; (3) that no scutage or aid or other extraordinary tax, other than the three feudal aids, could be lawfully imposed or collected but by the common counsel of the realm, *nisi per commune consilium regni nostri*; and (4) that no freeman should be deprived of life, liberty or property, except by the lawful judgment of his peers or by the law of the land, *nisi per legale judicium parium suorum vel per legem terrae.* The acceptance of those principles carried with it a definite repudiation of the teachings of the Roman lawyers expressed in the maxim of the Institutes, *'quod principi placuit, legis habet vigorem'* (the constitution of the prince has the force of law), which had been cited with approval by Ranulf de Glanvill, the great justiciar of Henry the Second. .

IV

The government of England during the Anglo-Saxon period was in form a limited monarchy. There was no parliament or other representative national assembly in the modern sense. But in each of the heptarchic kingdoms which sprang up during the sixth and seventh centuries we find that the king administered the affairs of the government with the advice and consent of a witan, which was composed of the bishops, the ealdormen of the shires, and a number of the king's administrative officers and

thegns, who were generally described as ministri. The number of the witan in each of the heptarchic kingdoms was never very large, and even after the consolidation of political power under the West Saxon kings during the tenth century the number of members who actually attended a witenagemot probably never exceeded one hundred. In a witenagemot held at Luton in November, 931, there were present the two archbishops, two Welsh princes, seventeen bishops, fifteen ealdormen, five abbots and fifty-nine ministri. In another witenagemot held at Winchester in 934, there were present the two archbishops, four Welsh kings, seventeen bishops, four abbots, twelve ealdormen and fifty-two ministri. An assembly thus constituted possessed many of the attributes of a genuine national council.

When the kingly office became vacant on account of the death of the king or the happening of any other event, the office was filled by election by the witan, but the succession was by constitutional practice restricted to one family. The king was the defender of the public peace, the leader of the host, the supreme judge to whom a final appeal might be made from the local courts. The national officers were his officers; the sheriff's were his stewards. The public peace was his peace. The power which the king was able to exercise over his people depended much upon his own qualities of leadership in military operations and in the management of the civil administration. But in all matters of great importance, the king usually acted with the advice and consent of his witan; and this was true in the earliest times. Legislation was enacted, taxes were imposed, and war and peace were determined by the king with the advice and consent of the witan. The laws of Ine, promulgated at the end of the seventh century, were enacted "with the advice and instruction" of the bishops, "together with all my aldermen, the most distinguished witan among my people, and also a great assembly of God's servants." The dooms of Alfred were promulgated after the king had taken the advice of his witan. Ordinances of Edmund (942-46) recite that they were issued by the king and his bishops, together with his witan, and we may assume that ordinances issued by Edgar (958-75) were enacted in the same manner. The laws of Aethelred (980-1016) recite that they were drawn up by the king and his witan; and a secular ordinance of Canute (1016-35), dealing with many subjects, included the amounts of the heriots of the English earl and thane, recites that it was enacted by the counsel of the witan.

The witenagemot was in no sense an independent legislative body, like the Roman senate during the period of the republic, or the British house of commons of our own time. Many of its members owed their places directly to appointments by the king. The bishops were either nominated or appointed by the king. The ealdormen of the shires were in theory at least appointed by the king. The great officers of state were

appointed by the king. And these men were all members of the national council. But there were also other members in attendance upon its meetings, who were not entirely subject to the control of the king. These were the provincial magnates whose support and good-will were indispensible for the maintenance of the royal authority in the shires and for the defense of the kingdom against foreign invasion. Alfred and his capable son and grandsons had no difficulty in rallying to their support these provincial magnates who represented the political and military power of the nation at large. The weakness of the king himself and his inability to secure the genuine cooperation of these provincial leaders in repelling the Danish invasion at the end of the tenth century were the responsible cause of the downfall of West Saxon monarchy during Aethelred's reign.

Little is known about the administration of the public revenue under the Old English monarchy. The maintenance of the royal household was provided for, in the main, out of the proceeds of the royal properties and the public lands; and local requirements were met by the alodial obligations discharged by personal service. The king had a large property in lands and revenue—large when one considers the actual needs of the state in those early times. The king's property in lands was of three kinds: First, his private estate, which he could dispose of by will; secondly, the proper demesne of the crown, comprising palaces and their appendant farm lands, and even cities and burghs founded upon old royal estates. These, according to Stubbs, belonged to the king as king, and could not be alienated or burdened without the consent of the witenagemot. And he had, thirdly, rights over the folkland of the kingdom, which with the consent of the witan he could make use of for the benefit of his followers. The king shared in the fines and other proceeds of the courts of law. He received the proceeds of forfeited lands and goods secured to him by the sentence of the witan. He received the produce of wreck and treasure trove, mines and salt works, and tolls and other dues of markets and ports; and there were customary payments in kind and in money, such as food rents, carriage service, housing and quartering duties, or substitutes for them.

During the tenth century new and more drastic methods of raising revenue had to be provided for the payment of tribute to the Danish invaders; and Aethelred, with the advice of his witan, levied Danegelds in ever increasing amounts for that purpose. The first tax of this kind seems to have been collected in 991 for the payment of a tribute of 22,000 pounds, and similar levies were made on at least four other occasions thereafter during Aethelred's reign. After 1012, when Thorkel and the ship's companies which followed him gave their allegiance to Aethelred, a tax of the same general character was imposed each year for their support. Thereafter, during the reign of Canute and his sons and the first years

of Edward the Confessor the proceeds of the levy were used for the payment of the king's housecarles, and the tax was often referred to as the "Heregeld" or army tax. The Saxon Chronicle for 1052 speaks of Edward as putting an end to the Danegeld, and F. M. Stenton in his book on "Anglo–Saxon England" says that the tax ceased to be collected in 1051. But Professor Paul Binogradoff, in his book entitled "English Society in the Eleventh Century," takes the view that only a temporary respite in the imposition of the tax was meant by the entry in the Saxon Chronicle. William the Conqueror is known to have imposed geld levies in 1066, 1067 and 1083, and there is evidence of an undated levy in the central years of his reign. The Danegeld was collected by the Norman kings on the basis of assessments handed down from Anglo-Saxon times. The Danegeld was levied under William Rufus and under Henry the First during the first years of Henry's reign. But Stubbs says that Henry the First in 1132, under the impression created by a strange dream, vowed to forego the levying of the tax for seven years; and in a charter issued at Oxford in 1136 Stephen pledged himself to abolish the tax entirely.

V

The Norman Conquest had a far-reaching effect upon the course of development of English political institutions. F. M. Stenton, in his excellent treatise on "Anglo-Saxon England," says that "The cardinal principle of the Conqueror's government was the wish to rule, and to be accepted by Englishmen, as King Edward's legitimate successor. He (William) claimed the English throne as the heir whom the Confessor himself had selected from among all his kinsmen. He preserved the constitutional framework of the Old English state, so that it was without any breach of continuity that the Old English *witen gemot* developed under him into the feudal *Commune Concilium.* His administration was based on the theory that he had restored the good law of King Edward's time after it had been overthrown by Harold's usurpation. Few invaders who have overcome so strong an opposition have been so much at pains to disguise the fact of conquest." Feudal ideas of land tenure were practically unknown in England at the time of the Conquest, and William made no immediate effort to substitute the Frankish system of tenure for the Anglo-Saxon idea of landholdings. William's action in putting into effect the feudal idea of military tenure was taken sometime after his conquest of the country had been completed, and was perhaps taken as a result of the military necessities which developed during the later years of his reign. The military system of the Old English state had proved itself to be wholly inadequate for the defense of the realm against foreign invasion. The Danes had occupied the country during the last years of Aethelred's reign. The Normans had conquered the land fifty years later. William himself was faced with the necessity of defending the country against

threatened invasion from Denmark. Tenure by knight service was therefore put into effect, and the Norman baronage became the king's tenants-in-chief, and the greater barons became members of the great council of the kingdom.

In its composition the great council of the kingdom of the Anglo-Norman period resembled closely the witenagemot of the Anglo-Saxon period. The bishops and abbots and the great officers of state and the chiefs of the Norman baronage made up the assembly. During the reign of the Conqueror, or during the reign of any other strong king like Henry the First or Henry the Second, it is unlikely that any member of the council would have undertaken to thwart the wishes of the king. But the council, nevertheless, as an assembly of the magnates, served to keep alive the principle that the monarchy was not an absolute monarchy of the Roman imperial type. The council in fact retained at least a part of the legislative authority which had been exercised by the witenagemot during the pre-Conquest period. Stubbs says that it was with its counsel and consent that the Conqueror amended the laws of the Confessor and divided the ecclesiastical from the secular courts. The extent to which the council was consulted in matters relating to the levying of taxes is not clear. But, in view of the nature of the taxes that were levied during the Anglo-Norman period, it is probably that the king took counsel with his barons, or at least made it appear that he was taking counsel with them, before ordering the collection of the tax. And on the question of the right of the baronage to be consulted before extraordinary tax levies were imposed, the barons of the Charter might have found precedents dating back to the time of William the First to support their contentions.

The tenure by knight service which William established was created by livery of seisin and was accepted by the rendering of homage and the taking of an oath of fealty. To make a tenure by knight service a determinate quantity of land was necessary, which was called a knight's fee; and the value of a knight's fee was usually placed at twenty pounds. The tenant by knight service was bound to attend his lord to the wars for forty days in every year, if called upon; such attendance constituted the rent service which he was to render for the land which he claimed to own. If the tenant held only half the knight's fee, he was only bound to attend twenty days, and so in proportion. It is probable that the tenants-in-chief, when the system was first introduced, meant to subject themselves only to the liability for such military service based upon the number of knight's fees which they held. But to the military service there were soon added other burdens which during the reigns of succeeding kings the barons were unable or unwilling to bear.

In view of the fact that several of the articles of the Charter were aimed at providing relief from these additional burdens, it is necessary that we mention some of them.

In addition to the military service for which he became liable, the tenant by knight service became liable for the payment of aids of various kinds, which were originally mere benevolences granted to his lord in times of difficulty and distress, but which later acquired the status of legal liabilities which the tenant could be required to discharge out of the income of his estate. The aids were principally three: First, to aid the lord's person, if taken prisoner, and for neglecting to do so whenever it was in the vassal's power there might be an absolute forfeiture of the tenant's estate; secondly, to contribute to the expense of knighting the lord's eldest son; and, thirdly, to make a contribution for the marriage of the lord's eldest daughter. The king as lord paramount was entitled to these aids for his tenants-in-chief. And from bearing their just proportions of the contributions to these aids no rank or profession was exempt. Even monasteries which held lands by knight service were required to contribute. To these aids, which were generally recognized as legal incidents of tenure by knight service, there were later added other exactions, such as aids to pay the lord's debts, and aids to enable him to pay aids or relief to his superior lord.

Other feudal burdens which became definitely attached to the military tenure of lands included reliefs, which were exacted of the heir upon the death of his ancestor for the privilege of taking up the inheritance. The exaction of a relief to be paid by the heir for the privilege of taking up the estate at the death of the last tenant had its origin when feuds were looked up as only life estates; but the exaction continued after the feuds had become hereditary; and this burden was therefore considered a most grievous and unjust incident to the military tenure of land. The amount of the relief that might be demanded was at first left to the arbitrary discretion of the lord. And, to remedy the abuses incident to the exactions of relief, the Conqueror undertook to regulate the amount of the relief that might be demanded; and it was ordained that the amount of the composition should be 100 shillings for every knight's fee. William Rufus did not adhere to this composition arrangement, and again demanded arbitrary sums as reliefs from the heirs of his military tenants, and in effect obliged each heir to purchase anew or redeem his land. Henry the First, however, restored the rule laid down by his father.

Primer seisin, which was the right of the king, when a tenant in capite died, to receive of the heir one whole year's profits of the land, was indeed little more than an additional relief. But this burden could be exacted only by the king of his tenants in capite.

Payments of relief, however, were only due if the heir was of full age. If the heir was under the age of twenty-one years, being a male, or fourteen, being a female, the lord was entitled to the wardship of the heir; and this wardship consisted in having the custody of the body and lands of such heir, without being required to account for the profits, till the heir became twenty-one years of age, if a male, or sixteen years of age, if a female. When the ward arrived at the age of mtaurity he might have his lands delivered to him upon the payment of a fine equal in amount to half a year's profits of the land. The lord also had a right to dispose of his ward in marriage, and in doing so usually made a profitable bargain for himself. Blackstone regarded this as one of the greatest hardships of feudal tenure. The abuses of the above mentioned rights of relief and of guardianship and the right to dispose of the ward in marriage were listen among the grievances which the barons laid before the king during the negotiations which immediately preceded the granting of the Charter.

By the time of the accession of Henry the Second the greater part of the lands in England were held upon military tenure based upon knight service owing by the tenant to his lord. The tenants-in-chief held of the king in capite. Under the system thus established it was supposed that the defense of the realm would be maintained by the king's own subjects and that such defense would not be entrusted to hirelings or foreigners. Knight services were personal in many respects, uncertain as to their quantity and duration. The personal attendance in knight service was often troublesome and inconvenient, and the tenants found means of compounding for it: first, by sending others in their stead, and later by making pecuniary satisfaction to the lord in lieu of if. After the accession of Henry the Second, this pecuniary satisfaction was required to be made by the payment of an assessment based upon the number of knight's fees for which the tenant was liable. And this money payment came to be known as scutage. A scutage was levied by Henry the Second in 1158 for the purpose of providing funds to defray the expenses of his proposed expedition to Toulouse. Thereafter when the king went to war a scutage might be demanded from all the landholders of the kingdam to defray the expenses incurred in hiring mercenary troops. Scutages of this kind were in fact frequently levied during the reigns of Henry the Second's sons. And the abuse of the king's prerogative in making such levies added greatly to the baronial resentments which reached their climax in 1215.

VI

When John came to the throne there were three types of special tax levies which had been used during the reigns of his father and his brother, namely, the hidage or carucage, the tallage and the scutage.

The hidage represented the ancient form of land tax, which had been in use since the latter part of the tenth century. The word "hide" originally denoted the amount of land necessary for the support of a free peasant family. In the twelfth and thirteenth centuries a "hide" usually meant 120 acres of arable land, with the meadow and pasture rights locally considered appurtenant to such a tenement. But there is evidence that in Anglo-Saxon times, at least in Wessex, the hide represented a much smaller tract of land, probably 40 or 48 acres. In any case, the hide was treated as the usual measure of land in the local organization of early English society; and it was later used as the basis for determining the amount of the financial contribution which each district was required to make when special demands were made to meet a national emergency.

Under the Norman and early Plantagenet kings a levy of two or more shillings on each hide of land was a usual and recognized method of raising money. The feudal aids were levied on the hide. In 1109 Henry the First levied an aid of three shillings per hide for the marriage of his daughter Matilda with the emperor Henry the Fifth, and in 1194 a hidage was levied by the ministers of Richard the First to help provide money for the ransom of the king. The word hidage, however, fell into disuse and the land tax came to be referred to as carucage. The hidages and carucages levied by Richard and John were similar to the Danegeld levied under an earlier period.

Tallage was the basic levy of the seignorial system. Tallage was taken when the king or any other feudal lord had a share or part of the value of a man's goods or chattels, or a share or a part of the annual revenues of his lands.

Scutage was a special tax levied by the king upon his military tenants as a pecuniary commutation of the military service due from the holder of a knight's fee.

The Norman wars in which Richard and John were involved required the long-term services of a force of knights, in addition to the mercenaries and the local levies and garrisons. Between 1194 and 1198 Richard made several attempts to raise such a force from his English fiefs. The king wished to have his English vassals equip and pay for a small long service army. And in 1198 he demanded that the military obligations of the vassals be treated as a whole by the levy of a tax to pay 300 knights. This force was to be enlisted to serve for a year, and was to be used for his war in Normandy. The sum requested was 16,425 pounds. The demand was unprecedented. The bishop of Lincoln, in the council of barons held at Oxford, declared that he would not assent to the grant, for the reason that the lands of his church were bound to render military service within England and there only. The bishop of Salisbury

likewise objected; and the opposition was so great that the proposal was withdrawn. Stubbs says that this event in itself constituted a landmark in the constitutional history of England, in that a constitutional opposition to a royal grant for money was made, and made successfully. During the same year the king, as we have already stated, attempted to impose a tax of five shillings on each carucate of 100 acres of land; and this tax was collected only with great difficulty.

VII

In the foregoing sections of this article I have undertaken to give a brief outline of the historical events which led up to the baronial revolt against King John and a brief statement of the constitutional basis of the demands made of the king at Runnymede.

Let us now examine the provisions of the Charter itself for the purpose of ascertaining what those rights and liberties were which the barons required the king to confirm in the most solemn manner under his seal.

In the first article of the Charter the king promises for himself and his successors that the English Church shall be free and shall have its rights entire and its liberties inviolate. This article is patterned after the Charter of Liberties issued by Henry the First at the beginning of his reign, and was probably inserted in the Charter upon the advice and perhaps the insistence of Stephen Langton.

The next articles deal with the rights of inheritance by the heirs of military tenants, the wardship of minor heirs and their marriage, the right of the widow to have her marriage portion and inheritance set apart to her at once on her husband's death. In the second article it is expressly provided that, when a tenant-in-chief dies, if his heir is of full age and owes relief, he shall have his inheritance for the ancient relief: namely, the heir or heirs of an earl 100 pounds for the whole barony of an earl; the heir or heirs of a baron 100 pounds for the whole barony; the heir or heirs of a knight 100 shillings at most for a whole knight's fee; and whoever owes less shall give less, according to the ancient custom of fiefs. The article dealing with the guardianship of heirs provides that the guardian of an heir who is under age shall not take more from the land of the heir than reasonable issues and reasonable customs and reasonable services, and this without destruction or waste of men or things. The guardian shall be required to keep up the houses, parks, preserves, fish-ponds, mill, and other things belonging to the land out of the income derived from the land. Heirs shall not be contracted in marriage before the blood relatives of the heir are notified. The widow of the tenant-in-chief is guaranteed the right to have her marriage portion and inheritance

set apart to her immediately after the death of her husband, and she shall be permitted to remain in the house of her deceased husband for a period of forty days after his death, within which time her dowry shall be assigned to her. No widow shall be forced to marry again so long as she wishes to live without a husband.

The above mentioned articles were inserted in the Charter for the purpose of protecting the tenants-in-chief of the Crown from the abuses of feudal rights incident to the feudal tenure of lands, and for the purpose of protecting minors from the unreasonable burdens of wardship, and for the purpose of securing the widow against unreasonable delays in having her marriage portion and her part of her husband's property set apart to her.

In the ninth and tenth articles of the Charter the lot of the debtor classes is mitigated in the following particulars: Neither the king nor his bailiffs shall be allowed to seize the lands of a debtor, if the chattels of the debtor are sufficient to repay the debt. Sureties shall not be distrained for the payments of the debts of a chief debtor so long as the chief debtor is himself able to pay the debt. If the chief debtor is unable to pay, the sureties shall be responsible for the debt; and if the sureties are required to pay they shall have the lands and revenues of the debtor until satisfaction is made to them. If anyone has borrowed money from the Jews and shall die before the debt is paid, the debt shall not bear interest as long as the heir is under age. If anyone dies owing a debt to the Jews, his wife shall have her dowry and shall pay nothing on the debt; and the children shall be provided with the necessasy maintenance before the lands can be seized for the payment of debts, save only the service due the lord.

The next succeeding articles of the Charter relate to the levying and collection of taxes by the king. These are the articles in which the barons were perhaps most vitally interested. In Article 12 it is expressly provided that no scutage or aid, other than the three regular feudal aids, shall be henceforth levied or imposed but by the common counsel of the realm. The three regular feudal aids which are excepted are aids levied for ransoming the king, in the event he should be taken prisoner, the knighting the elder son of the king, and for once marrying the king's eldest daughter; and, for these purposes only, a reasonable aid shall be taken. These limitations on the power of the king to impose taxes are to apply also to aids demanded of the City of London. In Article 13 the king promises that the City of London shall continue to enjoy all of its ancient liberties and customs; and a similar promise is made to all other cities, boroughs, towns and ports.

In order to have the common counsel of the nation, which it is thus provided that the king must have for the levying of taxes, other than the

three feudal aids mentioned above, it is further provided in Article 14 of the Charter that summons shall be issued for the tenants-in-chief at least forty days before the date fixed for the holding of the council, and that the archbishops, abbots, earls and greater barons shall be summoned individually by royal writ, and that all other tenants-in-chief shall be summoned by a general writ addressed to the sheriff of their shire; and when the day has arrived for the holding of the council those who have obeyed the summons shall be taken to represent the whole body.

For the purpose of strengthening the ideas set forth in the next preceding articles, it is further provided in Article 15, that the king shall not grant to anyone the right to take aid from his freemen, except for ransoming his body, for knighting his eldest son, and for once marrying his eldest daughter; and for each of these purposes only a reasonable aid shall be taken.

The meeting of the greater and lesser barons, as provided for above, was not the meeting of a parliament in the modern sense. The assembly of the king's tenants-in-chief was an assembly of the magnates and the king's feudal tenants, and not a representative assembly of the English people. Another one hundred years must pass before a parliament representative of the three estates comes into being. Stubbs says that the Article 12 probably contained nothing which had not been for a long time in theory a part of the constitution. We have already seen that during the Saxon period the West Saxon kings collected Danegelds with the advice and consent of the witan. But the composition of the witan was determined in the main by the king himself; and the men who attended its sessions were usually those who had been especially summoned by the king who could wtihhold a summons from any whose presence was not desired. But under the Charter which John was required to sign the king could not withhold a summons from any who were entitled to be notified, if he expected to ask for an additional aid, and in this respect Article 12 of the Charter represented something new in the development of English constitutional theory.

VIII

The next articles of the Charter deal with the administration of justice in the king's courts. It is expressly provided that the court of common pleas shall be held at a definite place, and that the court shall not follow the person of the king. Assizes of novel disseisin, of mort d'ancestor, and of darrein presentment are to be held only in their counties of origin. Itinerant justices shall visit each county four times a year, and they, together with four knights of each county elected by the county court, shall hold the assizes in the county on the day and at the place set for the meeting of the county court.

Amercements of freemen shall be in accordance with the gravity of the offense; and the same rule shall apply to amercements of villeins; and no freeman or villein shall be amerced except by the oath of good men from the neighborhood. Earls and barons shall be amerced only by their peers, and only according to the degree of the misdeed. No clergyman shall be amerced with respect to his lay tenement except in the manner above stated, and only the lands which he holds by lay tenure shall be answerable for the amercement. The lands of those convicted of felony shall be held by the king only for a year and a day and shall then be given to the lord of the fief.

For the purpose of restricting the encroachment of the king's court upon the jurisdictional rights of a baron or other free holder over his men, it is expressly provided that the writ called praecipe shall not be issued for anyone concerning any tenement whereby a freeman may lose his court. Several other articles are designed to purify the administration of justice in the royal courts. In article 40 the king promises that justice shall not be sold or delayed or denied to anyone. In other articles the king promises that only such men as know the law and desire to observe it will be appointed as justiciars, constables, sheriffs or bailiffs; and that no sheriff, constable, coroner or bailiff shall hold the pleas of the crown. Nothing shall be taken or given for the writ of inquisition concerning life and limbs, a writ designed to relieve a man of trial by combat when he had been appealed "through spite and hatred"; but such writ shall be issued gratis and shall not be denied. No bailiff shall henceforth put anyone to his law by merely bringing a suit against him without trustworthy witnesses presented for this purpose.

Several clauses are inserted in the Charter for the purpose of checking the abuses of local officers, including sheriffs and bailiffs. No town or individual shall be required to build bridges or maintain river banks, except such as ought to be so maintained by ancient custom. All counties, hundreds, wapentakes, and tithings are to remain at the ancient farms without any increment, except the king's demesne manors. No sheriff or bailiff or other person shall take the horse or carts of any freeman for carriage duty except with the owner's consent. Neither the king nor his bailiff shall take a man's timber for castle building; or for doing any other work for the king without the consent of the owner of the timber. No constable or other bailiff shall take grain or other chattels from the owner without immediate payment therefor in money, except by the consent of the seller. A knight who is required to render castle-guard service shall not be distrained to pay money for castle-guard when he is willing to perform that service.

In Article 35 provision is made for the maintenance of uniform standards of weights and measures.

In Article 27 we find an outline of the principles embodied in our modern statutes relating to the administration and settlement of the estates of decedents and the distribution of the personal property among the next of kin. If any freeman dies intestate, his chattels, under ecclesiastical inspection (that is to say, under the supervision of the ecclesiastical court), shall be distributed by the hands of his near relatives and friends, saving to each creditor the debts that the deceased owed him. If the deceased, at the time of his death, was indebted to the king, the sheriff, or bailiff, under a proper writ, shall be authorized to attach the chattels of the deceased for the amount of the debt, so that they may not be removed until the debt is paid. But the residue shall be left to the executors for the purpose of carrying out the will of the deceased. If nothing is owed to the king, all other chattels shall be subject to disposition according to the will of the deceased, or as intestate property to be distributed among the near relatives of the deceased.

At no point in the Charter is the idea that the king's power over his subjects is limited more clearly expressed than in Article 39, where it is expressly provided that no freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, except by the lawful judgment of his peers or by the law of the land. We do not find in this article, however, any definitely stated right to a trial by jury.

Article 40 of the Charter contains a guarantee that justice will be administered without delay and without price, which means that equal right shall be done to the poor and the rich. Merchants are guaranteed the right to go out of England and to return to England, for the purpose of buying and selling, according to established custom and without any evil exaction. The right to enter and leave the kingdom in peacetime is also guaranteed to every freeman.

The rights of the people to the use of the forests had been so circumscribed that the king was compelled to agree that all forests that had been afforested in his time should be disafforested at once, and that the same should be done with regard to the river banks which had been placed under ban during recent years. The king promised that inquisitions should be held immediately in each county for the purpose of correcting the abuses that had arisen within recent years concerning the customs of forest and and warrens (48).

There were many immediate grievances which the barons required the king to correct without delay. The king agreed to restore all hostages and charters which had been taken from the barons as security for the peace or for faithful service (49). The king agreed to the humiliating demand that he remove immediately from their offices certain foreign favorites who are specifically named (50). The king agreed that immedi-

ately after the restoration of peace he would remove from the kingdom all mercenaries who had been imported for the king's service during the troubled years immediately preceding the date of the granting of the Charter (51). The king agreed to restore all who had been disseised or deprived of their lands or their freedom without the lawful judgment of their peers; and it was expressly stipulated that if any dispute should arise in this connection the matter should be decided by the judgment of the 25 barons who were to be selected and charged with the duty of seeing that the provisions of the Charter were complied with (52). The king agreed that all fines and all amercements which had been levied unjustly and contrary to the law of the land, should be entirely pardoned, or the decision with reference thereto should be made by the judgment of the 25 barons and the Archbishop of Canterbury (55). Welsh grievances were to be redressed and hostages released. Justice should be done in the case of Alexander, King of Scotland, and Scottish hostages should be returned.

By the terms of the Charter it was expressly provided that the barons should elect 25 of their own number who should be be charged with the duty of seeing that the king faithfully observed the provisions of the Charter; and if, within 40 days after notice, the king should fail to redress the wrongs called to his attention, the 25 barons, together with the community of the entire country, should have the right to use force and levy war against the king until they secured redress according to the terms of the Charter. Decisions made by the 25 barons could be made by a majority vote.

In the last clause of the Charter the king again promised that the English Church should be free, and that all men in the kingdom should have and hold the liberties, rights and grants set forth in the Charter.

IX

The Charter was in effect a written covenant which the king was forced to make with his barons who were in armed rebellion. The provisions of the Charter followed closely the schedule of demand which had been made upon the king in the document presented to him by the barons in the meadow of Runnymede. The barons who negotiated the settlement with the king were in the main his military tenants-in-chief. The theory underlying their demands was that the king was bound by his coronation oath to govern according to the laws and customs of his predecessors; that the right of the barons to be consulted in matters of taxation and on other great questions of policy was firmly established by the laws and customs of the realm; that the rights and liberties of English freemen, although not set forth in written documents, were rights and

liberties which had been firmly established during the years of growth of the Anglo-Saxon Monarchy; and although the baronage made its demands primarily in its own interest, the Charter itself provided that all of the customs and liberties which had been granted by the king in the Charter, to be observed by him toward his tenants-in-chief, should be likewise observed by the barons themselves, both lay and clerical, toward their men.

The Charter has been justly regarded as one of the most important legal instruments ever published, and its influence upon the political history of the English-speaking peoples throughout the world cannot be over-estimated. William Stubbs, author of "The Constitutional History of England," in speaking of the Charter, said: "The whole of the constitutional history of England is a commentary on this charter." The Charter is in many respects a most unique, many-sided instrument. "In form a donation, a grant of franchise freely made by the king, in reality a treaty extorted from him by the confederate estates of the realm, a treaty which threatens him with the loss of his land if he will not abide by its terms, it is also a long and miscellaneous code of laws. * * * * * * On the whole, the Charter contains little that is absolutely new. It is restorative. John in these last years has been breaking the law; therefore the law must be defined and set in writing."[1] Bracton, writing fifty years after the Charter had been granted, could say: "That the king is below the law is a doctrine which even a royal justice may fearlessly proclaim."[2]

AUTHOR'S NOTE:

The foundation materials and reference books used by me in the preparation of this article were those immediately available to me in my own private library and in The State Library in the Capitol at Jackson. Those reference books included: Constitutional History of England, by William Stubbs (3 vols., Oxford, 1874-8); History of English Law before the Time of Edward I, by Sir Frederick Pollock and F. W. Maitland; Stubbs' Select Charters, 9th Ed., W. H. C. Davis; Green's History of the English People, by John Richard Green; Anglo-Saxon England, by F. M. Stanton, Oxford, 1943; English Society in the Eleventh Century, by Paul Vinogradoff, Oxford, 1908; Blackstone's Commentaries on the laws of England, Edited by William Carey Jones; Stephen Langton, by F. M. Powicke, Oxford, 1928; Sources of English Constitutional History, by Carl Stephenson and Frederick George Marcham; The Reign of King John, by Sidney Painter, 1949; the Cambridge Medieval History; and articles in the Encyclopedia Britannia.

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[1]Maitland, F. W. and Pollock, Sir Frederick, *The History of English Law before the Time of Edward I.* Vol. 1, Ch. VI, p. 171.
[2]Maitland and Pollock, *Ibid.*, p. 181.

THE MEASURE OF DAMAGES FOR TRESPASSORY PRODUCTION OF OIL AND GAS IN MISSISSIPPI

*Herman B. Decell**

The purpose of this article is to examine some of the problems involved in measuring damages for trespassory production of oil and gas. The setting of the problems can best be illustrated by a hypothetical case. *X*, landowner; *Y*, oil and gas lessee; and *Z*, royalty owner, have interests in oil and gas in Blackacre. *T*, trespasser, enters upon Blackacre and produces oil and gas. In *X*, *Y*, & *Z* v. *T* the court is confronted with the problem of assessing damages for *T's* trespassory production.

The possible claimants against *T* may vary. No oil and gas lease may have been granted on Blackacre, in which case a lessee, *Y*, would not be involved. Likewise, there may not have been a conveyance of royalty interests by either *X* or *Y*, and there would thus be no royalty owner, *Z*, seeking relief. Finally, *X* might have transferred all of his interests in the oil and gas to X^1 so that *X* would have a claim for surface injury only, while X^1 would have a claim for injury to the mineral interest.

In this article then, there will be a brief consideration of the property interests involved and a more detailed examination of the measure of damages. Discussion will be confined to the remedy against the trespasser and will not include possible relief against his transferee.

Property Interests Involved

In the evolution of oil and gas law two distinct theories of the nature of oil and gas interests have been advanced by the courts. Under the *ownership theory* there can be fee ownership of subsurface minerals, separate from ownership of the surface. Under the *qualified ownership theory* the only possible interest in the minerals is the exclusive right to drill, a profit a prendre. Under the former theory there is ownership of the minerals in place; that is, in their natural state, while under the latter there can be ownership only when the minerals have been severed and reduced to possession.[1]

The latter theory has ocacsionally been divided into two separate theories: (1) the landowner has no ownership in place but has the coequal right with other landowners to secure his proportionate share from the common reservoir;[2] and (2) the landowner has no property interest

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[1]See Note, *Property Rights in Oil and Gas in Mississippi*, 13 Miss. L. J. 427 (1941) and cases cited therein.

[2]Walker, *Property Rights in Oil and Gas and Their Effect upon Police Regulation of Production*, 16 Tex. L. Rev. 370 (1938).

in the oil and gas in place and acquires title only by reducing them to possession.[3] However, these two views are essentially the same, and it is understandable that the distinction would frequently not be made.[4]

One might suppose that these fundamental distinctions between the ownership and qualified ownership theories would affect the measure of damages for wrongful production. Yet, as will be shown below, the measure turns upon other factors, and the rule applied in an ownership jurisdiction such as Texas is the same as the rule in a qualified ownership jurisdiction such as Oklahoma.[5]

It has been suggested that the theory of ownership in a jurisdiction is of great importance and may materially influence the determination of questions arising in oil and gas cases, e.g., adverse possession, partition, abandonment, and taxation.[6] But it is doubtful that a particular theory would really be the controlling factor in a case. Courts apparently have arrived at fundamental rules dealing with the nature of the interests and then sought to formulate a theory that would be consistent and give symmetry to the law. Thus, it has been said that from a realistic viewpoint there is little difference between the landowner's common law property interest under the ownership theory and such an interest under the qualified ownership theory.[7] Indeed such theoretical differences have had little effect in police regulation of production,[8] an area where individual property interests are thrown in sharp relief with reference to the interests of the public and other owners. One can conclude that in general these theoretical distinctions are being more and more disregarded.[9]

Although Mississippi has adopted the absolute ownership theory,[10]

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[3]Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas,* 7 TEX. L. REV. 1 (1928).

[4]See discussion of distinction, *ibid,* p. 2.

[5]*Compare* Bender v. Brooks, 103 Tex. 329, 127 S.W. 168 (1910) and Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 157 S.W. 737 (1913) *with* Barnes v. Winona Oil Co., 83 Okla. 253, 200 Pac. 985 (1921) and Sapulpa Petroleum Co. v. McCray, 136 Okla. 269, 277 Pac. 589 (1929).

[6]Note, *Property Rights in Oil and Gas in Mississippi,* 13 MISS. L. J. 427 (1941).

[7]Walker, *Property Rights in Oil and Gas and Their Effect upon Police Regulation of Production,* 16 TEX. L. REV. 370 (1938).

[8]*Ibid,* pp. 377-380.

[9]See Comment, 63 HARV. L. REV. 905 (1950).

[10]Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927); Stokely v. State *ex rel.* Knox, 149 Miss. 435, 115 So. 563 (1928), *appeal dismissed,* 278 U.S. 584, (1929); Pace v. State *ex rel.* Rice, 191 Miss. 780, 4 So.2d 270 (1941); Lloyd's Estate v. Mullen Tractor & Equip. Co., 192 Miss. 62, 4 So.2d 282 (1941); Merrill Engineering Co. v. Capital Nat. Bank, 192 Miss. 378, 5 So.2d 666 (1942); Cook v. Farley, 195 Miss. 638, 15 So.2d 352 (1943); Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So.2d 516 (1947). See also Note, *Property Rights in Oil and Gas in Mississippi,* 13 MISS. L. J. 427 (1941); Wade, *Recent Mississippi Oil and Gas Cases,* 18 MISS. L. J. 243-249 (1947); Eager, *Oil and Gas Law in Mississippi,* 21 TUL. L. REV. 372 (1947). The statement in Wilson, *Property Rights in the Law of Oil and Gas,* 14 MISS. L. J. 543, 549 (1942) that Mississippi has adopted the qualified ownership theory seems to be erroneous.

cases from qualified ownership jurisdictions may still be apposite analogies, at least on the issue of measure of damages.

The principal interests in oil and gas are: (1) interest of the landowner; (2) interest of the lessee; and (3) interest of the royalty owner, a transferee of the landowner or lessee.

The landowner or lessor has rights against trespass to the oil and gas deposits, and those rights will of course be protected by the courts.[11] The landowner before severance, or the owner of the oil and gas estate after severance from the surface estate, can recover damages by reason of an invasion of the oil and gas stratum by one without right.[12]

There are many kinds of royalties, i.e., shares in production,[13] but a detailed consideration of them is beyond the scope of this paper. For the purposes of this discussion it is sufficient to note that the royalty owner has an interest in the oil and gas and will be a claimant against the trespasser.

Succinctly stated, the interest of the lessor after execution of an oil and gas lease are: (1) reversionary interest in the oil and gas; (2) right to receive rentals and royalties during the life of the lease; and (3) fee simple title to the soil.[14] These interests are all assignable.[15]

Where the lessor sues for interference with his rights by trespassory production, he usually sues on the basis of his right to royalty under (2) above. Since he does have a reversionary interest, it would seem that he would recover for injury to it. Apparently no cases have awarded damages on the basis of this interest, perhaps because of its speculative nature.[16]

Because of the circumstances surrounding the exploitation of oil and gas resources the ordinary legal relationships are not suitable for the owner and producer. Thus, the producer does not find it practical to become the owner of the land, nor is it feasible for the ordinary landowner to engage in production operations. Hence, it has been found necessary to create in the oil and gas producer such a type of legal interest in the land that he may lawfully explore for and produce oil and gas, and give as consideration for the privilege a share of that produced, while leaving to the landowner beneficial use of the land not needed for production. Such

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[11] 1 SUMMERS, OIL AND GAS § 21 (Perm. ed. 1938).

[12] Walker, *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 130 (1928).

[13] See SUMMERS, *op. cit. supra* note 11, §§ 131-132, 136; 3 *id.* §§ 571-572.

[14] Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946).

[15] *Ibid.*

[16] See discussion of problems raised: Comment, 27 CALIF. L. REV. 192, 199-200 (1939).

an arrangement has been commonly called a "lease," although it differs in many respects from an ordinary lease of realty.[17]

Like the landowner and royalty owner, the lessee has a property interest that is uniformly protected by the courts irrespective of theoretical differences as to the nature of the interest.[18]

Where the various owners of oil and gas interests sue the trespasser, damages must be mathematically apportioned according to the interest of each. Since this article deals only briefly with the interests involved, there will be no consideration of the apportionment of damages among the various claimants, and subsequent discussion will be confined merely to the measure of damages.

Measure of Damages

Applicable Rules

The problems presented in measuring damages for wrongful production of oil and gas are very interesting but unfortunately have given the courts considerable difficulty. The courts have had trouble not only in formulating abstract rules but also in applying the rules to particular cases. Computation of these damages necessarily involves accounting and other matters of judgment. It is apparent then that a precise measure will seldom be possible in these cases, and a reasonable estimate is the best product that can be tailored for the given situation.

The Mississippi Supreme Court has not yet considered the question of measure of damages for trespassory production of oil and gas, although analogous problems have been dealt with in timber and gravel cases.[19] Where oil and gas questions have arisen, the court has shown a predilection for Texas cases.[20] Having adopted the Texas ownership and determinable fee theories, the court further inclined to look to Texas for oil gas precedents. Hence an examination of the Texas cases may be fruitful in predicting how the court will resolve these problems when they come before it.

The measure of damages in these cases is not dependent upon the nature of the action brought but upon the character of the original act of trespass to the land—whether the trespass was willful or mistaken.[21]

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[17] 1 Summers, *op. cit. supra* note 11, § 151. For the form of lease in common use in Mississippi see 7 *id* §§ 1235-1236 (1949 supplement) (Mississippi Producers 88 Revised).

[18] 1 Summers, *op. cit. supra* note 11, §§ 151-153.

[19] See, for example, Illinois Central RR. v. LeBlanc, 74 Miss. 626, 21 So. 748 (1897).

[20] See Thomas, *Non-Development of Oil and Gas Leases,* 20 Miss. L. J. 304, 305 (1949).

[21] Barnes v. Winona Oil Co., 83 Okla. 253, 200 Pac. 985 (1921); 1 Summers, *op. cit. supra* note 11, § 22.

The Mississippi Supreme Court has followed this rule in timber and gravel cases, and there is no reason to suppose that a different view would be taken in oil and gas cases. The court has said:

> "Formerly there seemed to have been some conflict in the decisions as to the measure of damages where trees had been cut or materials taken from the land of another, growing out of the common-law forms of action, a different rule sometimes having been applied for the same injury where the action was in trover or replevin, instead of trespass. The tendency of the courts has been to look less to form, and more to the substantial object of all rights of action, which is to redress the injury by just compensation. The weight of authority both in England and America is that where the trespass was from ignorance, and was not willful, the damages will be confined to the value of the property in situ and such other damages to the land as the mining may have caused."[22]

The general rule for measuring damages where a trespasser has severed something from the realty and the landowner brings an action to recover for the injury was stated in the leading case, *Wooden Ware Co. v. U.S.*,[23] as follows: (a) for willful trespass the measure is the full value of the severed material without any allowance for enhancement by the trespasser, and (b) for mistaken trespass the measure is the full value less allowance for any enhancement by the trespasser.

Various terms have been used to describe the character of the trespass, "willful," "intentional," or "bad faith" and conversely, "mistaken," "unintentional," or "good faith." These are obviously mere labels or conclusions for cataloging the results of the case and are not very helpful in determining the character of a particular trespass. They are useful in describing results, however, and for convenience in this paper the terms used in SUMMERS, *Oil and Gas*,[24] "willful" and "mistaken," will be employed.

The general rule set out above has been applied to cases of wrongful extraction of oil and gas.[25] The formulation of the rule applicable is as follows:

> "But in the oil and gas cases the above rule has been uniformly applied, by giving as damages the value of the oil and gas *in situ*, and, if impracticable to fix their value in this manner, to give as damages the value of the oil in the tank or pipe line, less

[22]Willing, Special Judge in Illinois Central RR. v. LeBlanc, 74 Miss. 626, 647, 21 So. 748, 751 (1897).

[23]106 U.S. 432, 1 S. Ct. 398 (1882).

[24](Perm. ed.) 1938.

[25]McCORMACK, HANDBOOK ON THE LAW OF DAMAGES § 126(6) (1935); 3 SEDGWICK, THE MEASURE OF DAMAGES § 935 (9th ed. 1912); 1 SUMMERS, *op. cit. supra* note 11, §§ 23-24.

> the reasonable cost of production. The theory of this rule in its operation is that the trespasser, because of his good faith, has the legal power by his improvement to acquire title by accession. In the taking of oil and gas, the severance and improvement are accomplished by the same physical act. On principle, the measure of damages must be the value of the oil and gas as they existed in the earth. But the value of these substances, *in situ,* because of their nature and the uncertainty and difficulty of their production, is hard to prove. The courts have therefore resorted to an easier method of proof; that is, the value of the oil and gas less reasonable cost of production."[26]

The cases are practically unanimous in holding the willful trespasser liable for the value of the oil and gas without any deduction for enhancement by him. In the case of a mistaken trespasser there are more variations, which will be considered below, but the great weight of authority accepts the measure quoted above.[27]

The distinction between willful and mistaken trespassers is thus a crucial factor in measuring these damages. The general attitude of the courts was expressed by Judge Lowell in the leading case, *Trustees of Dartmouth College v. International Paper Co.*:[28]

> "The good faith which will protect the defendant is not incompatible with some degree of negligence. Almost any trespass upon the rights of another which is not willful arises, in whole or in part, from the defendant's ignorance of something which he might have discovered had he exercised a certain degree of care."[29]

Accordingly the courts have generally not inquired into the reasonableness of a trespasser's good faith, and the "pure heart, empty head" doctrine has generally prevailed. However, where the trespess has been so reckless as to amount to willfulness, the trespasser has been held to be willful. This distinction drawn in other types of trespasses has been applied to oil and gas cases, as one might expect.[30]

A mistake of fact and a mistake of law are generally sufficient to constitute good faith.[31] Furthermore, in oil and gas cases courts have

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[26] 1 SUMMERS, *op. cit. supra* note 11, § 24.

[27] *Ibid.* The general rule was recently reaffirmed by the Supreme Court in *U.S. v. Wyoming,* 331 U.S. 440, (1947).

[28] 132 Fed. 92, 98 (C.C.N.H. 1904).

[29] See also Note, *Measure of Damages for Unauthorized Production of Oil and Gas: The Role of Good and Bad Faith,* 15 TUL. L. REV. 291, 294-295 (1941).

[30] 1 SUMMERS, *op. cit. supra* note 11, § 23.

[31] *Ibid.* One court has held a mistake of law not to be sufficient to constitute good faith, *Pittsburgh & W.Va. Gas Co. v. Prentess Gas Co.,* 84 W.Va. 449, 100 S.E. 296 (1919), but the decision ha bseen severely criticized in Note, 28 W. VA. L. Q. 133 (1922) and confined to its facts by *Pan Coal Co. v. Garland Pocahontas Coal Co.,* 97 W. Va. 368, 125 S.E. 226 (1924).

recognized the possibility of irreparable injury through drainage, salt water damage, etc., if production is halted during a controversy. Hence, courts have distinguished oil and gas cases from other trespass cases and have held production to be in good faith even though the producer learns of an opposing claim.[32]

In a tort case the traditional primary purpose of damages has been to make the injured party whole, i.e., to put him in the position he would have occupied had the tort not been committed. Courts have recognized the inadequacy of substitutional relief but at the same time have been equally aware that an injured party should not be overcompensated by profiting from his own injury.[33] In a limited class of cases courts have allowed punitive or exemplary damages, damages in addition to compensation.[34] Such damages have been vigorously attacked by commentators although occasionally defended.[35] One can conclude that such damages are at least useful in fulfilling admonitory and deterrent functions in the law.

It is apparent that if the willful trespasser is held liable for the value of the converted property without any deduction for enhancement by him, punitive damages are being exacted. The owner has suffered only the loss of his property in its unimproved state, and if he recovers an additional amount equivalent to enhancement by the trespasser, that additional amount is noncompensatory and therefore punitive in its effect.

Strangely enough, few courts have recognized the punitive character of this rule.[36] The courts generally assess damages for willful trespass without discussing the punitive aspects at all. Such an approach is perhaps due to the formulation of the rule: "the mistaken trespasser is allowed a deduction," *not* "the owner may recover the value less enhancement by the mistaken trespasser."

This distinction may appear to be merely verbal, yet it was seized upon by the Texas Supreme Court to impose on the mistaken trespasser the burden of proof of expenses incurred in enhancement and to deny him

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[32]See, for example, Barnes v. Winona Coal Co., 83 Okla. 253, 200 Pac. 985 (1921).

[33]*Developments in the Law—Damages—1935-1947*, 61 HARV.L.REV. 113, 116-117 (1947).

[34]MCCORMICK, *op. cit. supra* note 25, § 77.

[35]See Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419 (1909) (critical) and Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931) (recognizes utility of punitive damages). The arguments *pro* and *con* are summarized in MCCORMICK, *op. cit. supra* note 25, § 77.

[36]See, however, State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 N.W. 81 (1895) (frank admission by the court that rule is punitive) and Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App.2d 170, 66 P.2d 1215 (1937) (recognition that award of gross value without deduction for expenses in production amounts to assessment of punitive damages).

any deductions for failure to sustain the burden.[37] Similarly the Texas Court of Civil Appeals has declared the allowance of such deductions to be an equitable doctrine, which could not be availed of by a defendant invoking the statute of limitations to bar part of a plaintiff's claim.[38]

A clearer recognition of the punitive nature of the rule applied to willful trespassers would perhaps render a court more reluctant to impose the rule upon a trespasser. Although the Mississippi Supreme Court has approved of the assessment of punitive damages in the extreme cases where the tort was willful or reckless, the court has shown a marked reluctance to impose the statutory penalty for willful trespass in timber cases.[39] In *Seward v. West*,[40] Griffith, J., reviewed the earlier cases where the penalty had been sought and concluded:

> ". . . this court has always been cautious in the infliction of the statutory penalty, and will allow it only where the facts are well proved and where the testimony shows the trespass to have been willful, or the negligence so gross, or the indifference so real, or the lack of good faith so evident, as to be tantamount to willfulness . . . ."[41]

This attitude of the court might well lead to a reluctance to impose the harsh measure on a trespasser extracting oil and gas and a greater readiness to characterize him as merely "mistaken".

It has been suggested that there are two theories of liability for wrongful production of oil and gas: (1) interference with the plaintiff's exclusive right of capture, and (2) conversion.[42] The argument is that (1) may be different from (2); that the measure in (1) is injury to the plaintiff —either diminution of his daily production or depletion; and that the measure in (2) is the full value of the products in willful trespass, or such value with deductions in mistaken trespass. The argument recognizes the very difficult petroleum engineering problems in measuring the extent the injury under (1) and the temptation to the courts to accept as a measure the reasonable royalty of the trespasser's production. Except for the very few cases applying the royalty rule (discussed below) the courts seem uniformly to follow (2). Having the advantage of relative simplicity, (2) would seem prima facie to be the preferable approach. The first theory seems to offer no greater degree of accuracy in compensating

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[37]Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 157 S.W. 737 (1913).
[38]Marathon Oil Co. v. Gulf Oil Corp., 130 S.W.2d 365 (Tex. Civ. App. 1939).
[39]See Miss. Code §§ 1074-1075 (1942).
[40]168 Miss. 376, 150 So. 364 (1933).
[41]*Id.* at 385-386; 150 So. at 366.
[42]Comment, 27 Calif. L. Rev. 192 (1939).

the injured party, and there seems to be no cogent reason why it should be resorted to.

The general rule distinguishing between willful and mistaken trespasses places the burden of proof on the trespasser to show, if he can, that he was merely mistaken.[43] This imposition is desirable not only procedurally but also substantively. The warning that some persons make it their business to be "inadvertent" trespassers[44] suggests that perhaps a high measure of proof of good faith should be required.

The general rule further imposes an objective standard on the mistaken trespasser and allows only the reasonable cost of production to be deducted from the value of the products.[45] Unfortunately this aspect of the rule has been given little attention in the reported cases. There is a difficult problem of proof as to what is a reasonable expenditure in production; probably more than a mere mistake in business judgment would be required to show unreasonableness. This difficulty of proof perhaps accounts for the infrequency of plaintiff's claims of unreasonableness in reported cases and the dearth of judicial pronouncements on the matter.

A consequence of the rule with respect to mistaken trespassers is that the owner can recover no damages where the cost of production exceeds the value of the oil and gas extracted.[46] Such a case would seem to be a fertile field for the claim of unreasonableness in expenditures. It has also been suggested that in such cases the owner should be able to recover a reasonable royalty,[47] but such recovery would be a penalty and seems difficult to justify where the trespass is merely mistaken and the expenditures reasonable.

Since the Mississippi Supreme Court has followed the general rule in timber and gravel cases,[48] and the Texas courts have applied it uni-

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[43]1 SUMMERS, *op. cit. supra* note 11, § 23; MCCORMICK, *op. cit. supra* note 25, § 126. See also Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 157 S.W. 737 (1913).

[44]See Willis, *supra* note 35.

[45]1 SUMMERS, *op. cit. supra* note 11, § 24; 1 THORNTON, OIL AND GAS § 59 (5th ed., Willis, 1932). See also Bryson v. Crown Oil Co., 185 Ind. 156, 112 N.E. 1 (1916) (mistaken trespassers claimed $48,000 deduction; trial court made finding that more than $42,000 was excessive, hence allowed only latter; aff'd on appeal, court saying burden was on trespassers to get proper finding of allowable credits in trial court).

[46]Miller v. Tidal Oil Co., 161 Okla. 155, 17 P.2d 967 (1932); 1 SUMMERS, *op. cit. supra* note 11, § 24.

[47]See Note, *Measure of Damages for Unauthorized Production of Oil and Gas: The Role of Good and Bad Faith,* 15 TUL. L. REV. 291 (1941).

[48]*E.g.,* Peterson v. Polk, 67 Miss. 163, 6 So. 615 (1889); Illinois Central RR. v. LeBlanc, 74 Miss. 626, 21 So. 748 (1897); Bond v. Griffin, 74 Miss. 599, 22 So. 187 (1897).

formly in oil and gas cases,[49] it seems reasonably certain that the rule will be applied to oil and gas in Mississippi.

A variation from the general rule has been suggested and occasionally adopted by the courts in cases of mistaken trespass. Under this view the measure is a reasonable royalty on the oil and gas produced and results in a more charitable treatment of the trespasser. The usual effect of this measure, frequently called the "royalty rule", is to award the profit of development and production to the trespasser. This view has not been widely adopted, however.[50] Kentucky and Pennsylvania have applied it in coal cases,[51] and Kentucky has applied it to cases where the extraction of oil and gas was a trespass against only one co-owner.[52]

Something can be said for this measure in cases where the peculiar facts warrant a tempering of the general rule. An example might be a case where the owner has in some way been responsible for the mistaken trespasser's encroachment: the owner's conduct does not give rise to estoppel but at the same time is partially responsible for the trespasser's mistake. In such a situation the court might deem it appropriate to limit the owner's recovery to a reasonable royalty.

The Kentucky Court of Appeals has made the questionable assertion that the royalty rule should be applied to suits between landowner and trespasser, and the general rule to suits between lessee and trespasser.[53] The court did not elaborate on the distinction, and there seems to be little justification for drawing the line in such a manner.

Since the royalty rule is applied only in cases of mistaken trespass, it can hardly be said that the trespasser to oil and gas rights should be dealt with more harshly because they are subject to a lease. The only possible justification then would be on some theory of compensation to the injured party. It is no answer to say that the landowner has been injured only to the extent of the usual royalty interest, for he has also lost the profit on the production. The fact that if he chose to deal with an operator, the latter would get the profit, is irrelevant. Why a lessee but not a landowner should be awarded the profit remains unanswered.

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[49]Bender v. Brooks, 103 Tex. 329, 127 S.W. 168 (1910); Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 157 S.W. 737 (1913); Taylor v. Higgins Oil & Fuel Co., 2 S.W.2d 888 (Tex. Civ. App. 1928); Reynolds v. McMan Oil & Gas Co., 11 S.W.2d 778 (Tex. Civ. App. 1928); Broadway v. Stone, 15 S.W. 2d 230 (Tex. Civ. App. 1929); Houston Prod. Co. v. Mecom Oil Co., 62 S.W.2d 75 (Tex. Civ. App. 1933); Corrigan v. Shell Pet. Corp., 62 S.W.2d 663 (Tex. Civ. App. 1933); McMurray Corp. v. Shell Oil Co., 173 S.W.2d 354 (Tex. Civ. App. 1943).

[50]Comment, 27 CALIF.L.REV. 192, 196 (1939).

[51]Note, *Damages for Conversion of Minerals*, 21 NOTRE DAME LAW. 201, 202-203 (1946). Under the federal rule the royalty rule has been limited to cases where the trespasser is in possession and claiming under the owner. 1 SUMMERS, *op. cit. supra* note 11, § 24.

[52]Gerkins v. Ky. Salt Co., 100 Ky. 734, 39 S.W. 444 (1897); New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, 221 S.W. 245 (1920).

[53]Swiss Oil Co. v. Hupp, 253 Ky. 552, 69 S.W.2d 1037 (1934).

The Texas Supreme Court in *Bender v. Brooks*[54] expressly rejected the royalty rule although recognizing that it might be applied to cases with peculiar circumstances. There therefore seems to be little reason to suppose that the Mississippi Court will follow the royalty rule in the usual case. In an exceptional case where the facts are sufficiently strong to warrant rejecting the general rule applicable to mistaken trespass and to justify application of a milder rule, the royalty rule might well be a useful tool for the court to employ.

Sometimes because of changing factual circumstances it is desirable to employ two standards to a continuing trespass, and it may be appropriate to apply the royalty rule to a portion of the trespassory production. This approach was taken by the Kentucky court in *New Domain Oil & Gas Co. v. McKinney*.[55]

Application of the Rule

The first problem arising in applying the measure of damages to a given case is to ascertain the value of the minerals wrongfully extracted. This problem generally involves little difficulty because the courts uniformly agree that the value be determined by the prevailing market value of the oil and gas when run into pipe lines or tanks. The market values are generally readily accessible, being posted by various purchasers for a particular field, and in most cases the value can be easily calculated. Sometimes only a reasonable estimate may be possible, however.

An interesting problem arose in *Shell Oil Co. v. Manley Oil Corp.*,[56] where because of conflicting claims to title the value of the oil wrongfully extracted was less than the prevailing market price. The ordinary market price for the particular oil would have been $31,682.00, but because of the publicity of the title dispute the trespasser was able to obtain only $28,503.04 upon sale. The court found that the trespasser thus sold at approximately seven per cent below the market price but also found that the smaller amount was all that could be reasonably obtained in view of the disputed title. The court held that although ordinarily market value was the proper measure, under the circumstances present the price should be the reasonable amount the trespasser could and did obtain. This result seems to be appropriate enough in cases where the claim asserted by the trespasser is in good faith, although the principal case involved an application of the Illinois rule, which does not allow the mistaken trespasser to deduct the reasonable cost of production.

In cases of mistaken trespass it can well be argued that the true value of the converted minerals is only the reasonable price obtainable,

[54]103 Tex. 329, 127 S.W. 168 (1910).
[55]188 Ky. 183, 221 S.W. 245 (1920).
[56]50 F. Supp. 21 (E.D. Ill. 1942).

and not the price obtainable if the title were undisputed. On the other hand, in cases where the opposing claim is not in good faith, serious doubt may arise whether the owner should be limited to the actual sales price. It might be argued that the extent of injury to the owner is the prevailing market price, and he should not be limited to a small amount merely because some bogus claim has depressed the value.

A serious problem of computation arises in the case of a mistaken trespass, where deductions for the reasonable cost of production must be ascertained. Unfortunately the appellate courts have not given adequate attention to this issue,[57] and there is some conflict in the available materials.

The general standard has been well summarized as follows:

> ". . . the allowance should be sufficient to compensate for the actual cost of production, including drilling, digging, tramming, hoisting, transportation, treatment, overhead, and every essential expense not attributable to negligence or wastefulness."[58]

The standard is thus clear enough, but the actual computation of items of expense is very difficult, especially since trespasses do not usually coincide with accounting periods. Determination of allowable deductions must of necessity be a factual inquiry, and in many cases only a rough estimate will be possible. Care must be taken that the trespasser is not allowed to pad his costs at the expense of the injured party.

The scope of the problem was forcefully illustrated in *Standard Oil Co. of Calif. v. U.S.*,[59] where the owner obtained a judgment of $6,214,-102.42 against a mistaken trespasser, and disputed items of deduction aggregated several million dollars. Another very interesting case dealing specifically with deductions to be allowed was *Swiss Oil Corp. v. Hupp.*[60] Both of the cases considered individual items claimed and will be discussed under the appropriate headings below.

1. *Development costs.* These expenses may include geophysical operation costs, drilling costs, etc. The courts have generally allowed these costs to be deducted by the mistaken trespasser.[61] It has been suggested, however, that in computing development costs, expenses incurred in drill-

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[57] 1 SUMMERS, *op. cit. supra* note 11, § 24.

[58] 1 THORNTON, *op. cit. supra* note 45, § 59. See also Note, *Measure of Damages for Unauthorized Production of Oil and Gas: The Role of Good and Bad Faith,* 15 TUL. L. REV. 291, 299-303 (1941).

[59] 107 F.2d 402 (9th Cir. 1939), *cert. denied,* Standard Oil Co. of Calif. v. U.S., 309 U.S. 654 (1940), *rehearing denied,* 309 U.S. 697 (1940), *cert. denied,* U.S. v. Standard Oil Co. of Calif., 309 U.S. 673 (1940). The court relied to a considerable extent on the applicable California statute providing for damages in such cases. Except for an express prohibition on interest on the unliquidated damages prior to the trial, the statute is essentially an enactment of the common law rule.

[60] 253 Ky. 552, 69 S.W.2d 1037 (1934).

[61] See, for example, Miller v. Tidal Oil Co., 161 Okla. 155, 17 P.2d 967 (1932).

ing dry holes should not be included.[62] It is difficult to see why such expenses should not be deductible while other development costs are. If drilling a dry hole is a reasonable undertaking in exploitation, the costs incurred should be deductible. Since it is usually impossible to ascertain with assurance that a prospective well will be a producer, some dry holes are unavoidable, and the costs incurred are generally regarded as a production expense to be set off against income from production elsewhere obtained. It is difficult to justify penalizing the mistaken trespasser and awarding a windfall to the owner to the extent of these costs.

2. *Direct production costs.* These costs may include labor, materials, depreciation, etc. If the market value at the well is used as a starting point for computation, no allowance should be made for transportation costs, of course.

In the *Standard Oil* case one of the disputed items claimed by the trespasser and allowed by the court was cost of a compressor and absorber plant ($381,748.88). The court pointed out that this was a necessary expenditure, that unless the plant had been built, there would have been a loss to the owner of the oil and gas extracted—a loss of part of the dry gas and all of the wet gas. The court concluded that the owner was properly credited with the proceeds of the operation and the trespasser with the expense of construction and operation.[63]

3. *Sales costs.* Since the theory of the general rule is to award the value of the oil and gas in place by computing the value at the surface less reasonable costs of production, sales expenses would not seem to be a proper item for deduction. On the other hand, it can be argued that the value of property is not the market price but rather the market price less the cost of securing that price; that is, less selling costs. Neither the *Standard Oil* case nor the *Swiss Oil* case dealt with this specific problem.

4. *Overhead.* Though generally allowed as a proper deduction, this item presents a serious problem in cost accounting. Many items of managerial and office expenses must be calculated and allocated to the production in question, and there is probably more opportunity here for padding by the trespasser than in any other item of deduction. This possibility suggests that the courts should be especially wary and exact clear and convincing proof of all items claimed as overhead.

In the *Standard Oil* case the court allowed a deduction for overhead of $144,968.85 and pointed out that the amount was a proportion of the

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[62] See 1 THORNTON, *op. cit. supra* note 45, § 59. The text cites only one case to sustain this proposition.

[63] The problems of removal of and reimbursement for improvements made upon the property by the trespasser are only touched upon in this paper. For a general discussion, see Note, *Measure of Damages for Unauthorized Production of Oil and Gas: The Role of Good and Bad Faith,* 15 TUL. L. REV. 291, 300-303 (1941).

trespasser's general office overhead allocated to its operations on the disputed property in accordance with reasonable and accepted accounting practices.

In the *Swiss Oil* case out of approximately $60,000 of total deductions allowed $9,380.40 represented overhead. Overhead expenses were allocated to various leases of the trespasser in the ratio that wells on each lease bore to the entire number of wells operated by the trespasser. This ratio would give a fairly accurate measure if it be assumed that each well required the same amount of overhead expense. But if certain wells were more productive or otherwise necessitated greater overhead expenditures, it would seem that a mere numerical allocation ratio would lead to distortion. The problem is one of accounting, however, and reliance upon expert testimony of accountants is perhaps the best solution.

5. *Federal income taxes.* Income taxes at first blush would seem to be not a proper deduction. Such a notion perhaps arises from a recognition of their subjective character and may be somewhat emotional. But if a refund can be obtained by the trespasser, clearly the deduction should not be allowed.

Where refund is barred, still the burden should not be placed on the owner. It can be argued that income taxes are merely a part of the cost of production and that the net benefit to the trespasser was net income less income taxes. On the other hand, the trespasser will get a deduction for the amount paid in damages, and he has a reasonable chance of thus regaining the taxes paid. Finally, income from the production will be taxable to the owner upon collection of the judgment against the trespasser. The owner should therefore not be subjected to having income from his property taxable both to him and to the trespasser. As between the owner and trespasser, the latter seems more responsible for the dilemma and should consequently bear the burden.

The *Standard Oil* case involved the unique situation where the owner was the United States and had received the income taxes allocable to the trespassory production. Hence, the court found it easy to allow a deduction of $500,010.89 for income taxes because the owner had in effect received that amount from the proceeds of the production.

Likewise in the *Swiss Oil* case it was shown that the trespasser could still obtain a refund of income taxes, and a deduction was accordingly not allowed.

6. *State and local taxes.* A state income tax should stand on the same footing as the federal income tax. Other state and local taxes, however, are merely expenses of doing business and should be allowed as a deduction just like labor or material costs.

In the *Standard Oil* case items of state and local taxes were in dispute, but as lumped together they were allowed in entirety ($574,351.22). The opinion does not indicate what part of this amount represented state income taxes, and the court did not deal with them specifically. Theoretically they should not be deductible, especially since the owner (United States) would not have been liable for them.

The *Swiss Oil* case did not deal with this problem.

7. *Legal services.* This expense appears to be simply another reasonable cost of production, yet the matter is complicated by the rule forbidding recovery of attorney's fees in litigation in the United States. If the services involved do not deal with the litigation in which the owner seeks his recovery against the trespasser, the expenses should be deductible. It is equally clear that legal services in that litigation cannot be deducted. Where the services are those of counsel retained on a periodic basis or otherwise involve services rendered for both the litigation and other matters, there would seem to be merely a problem of accounting in allocating the deductible portion.

The difficulty of the problem is persuasively illustrated in the *Swiss Oil* case, where an otherwise unanimous court split eight to three in disallowing all the legal expenses claimed. In that case general counsel had been retained for $6000 per year. He rendered legal services in connection with all the trespasser's operations, and a deduction was claimed for so much of the $6000 as was allocated to the trespassory production. But because the same counsel had conducted the litigation for the trespasser, a majority of the court disallowed the deduction in its entirety. Such a result seems to be clearly erroneous. A deduction should be allowed at least for the allocable services not rendered in the litigation. As to that portion of the services rendered in the litigation, perhaps the rule against allowance of attorney's fees is paramount and should prevent deduction to that extent.

The *Standard Oil* case did not deal expressly with legal services.

8. *Other expenses.* Purchase price and acquisition costs of the lease and royalties paid to persons other than the owner are not valid costs of production and cannot be deducted. Presumably the trespasser would be able to recover most of the expenses from the recipients, whose supposed title failed. These items, aggregating over two million dollars, were expressly disallowed as a deduction in the *Standard Oil* case.

The above examples are not intended to be an exhaustive list of deductions for the reasonable cost of production. The facts of each case must be considered by the court or jury to ascertain what is a reasonable

cost. Obviously the standard is vague, and the trier has a wide range for arriving at a determination.

It may be argued that the standard is too vague, that the measuring rod afforded the trier of fact is too indefinite for practical administration. Yet the trier needs some discretion so that he can give due weight to all the conflicting considerations in the particular case. The whole process of measuring damages in these cases is a matter of judgment, and it is probably impossible to obtain a more precise standard for estimating allowable deductions.

Several conclusions are suggested by the foregoing inquiries. First, the measure of damages for trespassory production of oil and gas cannot and should not turn on a particular theory of ownership. Second, the courts should give greater recognition to the fact that holding a willful trespasser liable for the value of extracted minerals involves assessment of punitive damages. This recognition would lead to less readiness in holding trespasses to be willful. At the same time, courts should be careful not to permit a willful trespass to be characterized as merely mistaken. Finally, more attention should be given by the courts to the intricate problems involved in computing deductions allowed to a mistaken trespasser. More careful consideration of these problems would result in a more appropriate asssesment of damages.

DISSOLUTION OF PARTNERSHIPS BY DEATH—EQUITABLE POWER TO ORDER A CONVEYANCE BY DECEASED PARTNER'S REPRESENTATIVES OF HIS PARTNERSHIP INTEREST TO THE SURVIVING PARTNER

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For the sake of this article, let us suppose the following hypothetical. A Mississippi partnership has been dissolved by the death of partner X; the assets of the partnership consist of both real and personal property; the partnership agreement made no provision for the purchase by the survivors, on the death of a partner, of the assets of the partnership, or of the deceased partner's interest in the old partnership; the deceased partner made no provision in his will for a sale by his representatives to the survivors of his interest in the partnership; the surviving partners wish to buy the decedent's interest and carry on the business, and have offered a fair price therefor; the heirs of the decedent do not themselves wish to buy the survivors' interests and carry on the business; the representatives of the decedent's estate refuse to sell his interest for the sum offered by the survivors; and the partners who survive had a great deal to do with building up the business as it exists today.

In such a situation, will equity ever order the representatives of the deceased to sell to the surviving partners the deceased's interest in the partnership or in the partnership's assets, if equity finds that the price offered therefor by the surviving partners is the fair value thereof, despite the general rule that, wherever the surviving partners and the representative cannot agree on a division of the property in kind or on a price for the decedent's interest, all of the assets of the partnership will be ordered sold and the proceeds divided according to the respective interests of the partners?

No Mississippi statutes or cases have been found which answer the above question.

The only relevant Mississippi statute requires the sale of the deceased partner's interest to be approved by the Chancellor. This statute provides that: "The executor or administrator, with the approval of the Chancellor, may sell the interest of any decedent in the partnership estate."[1]

On the other hand, if the sale is of the assets of the partnership (including the good will), as distinguished from the decedent partner's interest therein, the sale of the partnership property will be by the executor or

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[1]Miss. Code § 553 (1942).

administrator of the decedent partner's estate, or by the surviving partner, if he gives the bond required by statute[2] (and conceivably a receiver might be appointed for the assets of the partnership, and the sale of the assets made by him, if the Chancellor should find that the representative of the decedent's estate or the surviving partner are disqualified for various reasons).

It is the general rule that where the representative of the deceased partner and the surviving partners cannot agree on the division of the property in kind or on the price at which the deceased's interest shall be purchased for cash, all of the assets of the partnership shall be sold at a sale hereafter referred to as a liquidating sale, and the proceeds divided according to the partners' respective interests. The rule is stated as follows in Corpus Juris:[3]

> "Ordinarily no partner can compel a division in kind on dissolution of the firm, nor be compelled to accept what his interest may be valued at on an appraisal, but each partner is entitled to have the property sold and converted into cash. This rule has been applied to both personalty and, in the absence of circumstances justifying partition, to firm realty."

And the same rule is stated as follows in American Jurisprudence:

> "The surviving partner cannot require the personal representative of the deceased partner to accept a share in the partnership property at a mere estimated value, but on request must ascertain the value of the firm property by the usual method of sale."[4]

The same rule applies where the purchase is of the assets of the partnership, as distinguished from the deceased partner's interest in the partnership. If the decedent's representative will not agree to a sale of the assets to the surviving partners, the Court, as a general rule, will not order a sale to them at a valuation fixed either by them or by the Court, but will order a general sale open to all comers. The following statement appears in Parsons, *Partnership*:[5]

> "It has sometimes been supposed that the surviving partners have a right to take the effects and merchandise, after the debts are paid or secured, at a valuation. *And, undoubtedly, there may be cases in which this would be a just and beneficial mode of settlement and the Court would therefore order it. But it must be clear that they have no such right.* Indeed, the right on this

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[2]MISS. CODE § 555 (1942).

[3]47 C. J., PARTNERSHIP § 858.

[4]40 AM. JUR., PARTNERSHIP § 306. For cases supporting the above rules, see Pierce v. Trigg, 37 Va. (10 Leigh) 408 (1839); Cathright v. Fulton, 122 Va. 17, 94 S.E. 191 (1917); Bagg v. Osborn, 169 Minn. 126, 210 N.W. 862 (1926).

[5]PARSONS, PARTNERSHIP § 348 (4th ed. 1893). For cases supporting this statement, see Crewshay v. Collins, 15 Ves. 218 (Ch. 1805); Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384 (1909).

> point is on the other side; for it would seem, both from the reason of the cases and on the authorities, that the representatives of the deceased have a right to require a sale of the effects as the only certain way of ascertaining the value in making a fair division. *But this again, although a rule, cannot be deemed a universal rule; for equity may find in particular circumstances good reasons for not decreeing the sale, although it must be admitted that it strongly inclines to that mode of settlement, as, on the whole, the fairest and safest.*" (Emphasis added.)

The above rules, however, stated from Corpus Juris, American Jurisprudence, encyclopedias and textbooks, are not rigidly applied to require a liquidating sale in all instances on the dissolution of a partnership. Although the situations in which equity will refuse to order a sale are few, the fact that a sale will not be ordered in all instances is admitted by Professor Parsons, as will be seen from the last quotation. There are many cases in which a court of equity has refused to order a liquidating sale of partnership assets on dissolution, even though the partners could not agree on a price for the retiring partner's interest or on a specie division.[6] Instead, the court ordered that the retiring partner convey to the others his interest in the property upon the latter paying a specified sum. It should be noted that all of these cases involve the situation where the partnership is dissolved by the voluntary retirement of a partner or by a wrongful act of a partner. None involve dissolution by death. There are, however, exceptions to the general rule of sale stated previously which show that the general rule will not be applied in all cases where equity dictates otherwise. The first and most important case is *Gelphman v. Gelphman.*[7] This was a suit for an accounting and dissolution of a partnership. The plaintiff and the defendant had for twenty years conducted in partnership a coal and junk business. In addition to other property, the partnership owned certain lots which were used in the operation of the partnership. After the plaintiff had been ill for sometime, he withdrew from active participation in the partnership, while the remaining partners continued to carry on the coal and junk business. In his petition, the plaintiff asked for an accounting, dissolution of the partnership, and for such relief as would be proper under all of the circumstances, but it should be noted that the plaintiff did not specifically ask in the lower court for a sale of all of the partnership assets and for a division of the proceeds. The defendants answered that the plaintiff had been allowed to withdraw certain sums during his sickness and that an accounting would disclose that nothing was due him now. The defendants prayed for an accounting, dissolution, and for judgment decreeing plaintiff to have no right or interest in the partnership assets

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[6]Gelphman v. Gelphman, 142 Kan. 582, 50 P.2d 933 (1939); Turken v. Olshanski, 237 Mich. 623, 212 N.W. 961 (1927); Dow v. Beals, 149 Misc. 631, 268 N.Y. Supp. 425 (1933).

[7]*Supra* note 6.

and that plaintiff be required to execute and deliver to the defendants a conveyance of all his interest in the real estate. A referee was appointed, and, after he had reported his findings, the court rendered judgment, allowing the plaintiff a small money judgment, directing the defendants to pay this money into court, *and ordering plaintiff to execute and deliver a deed to defendants covering his one-fourth interest in the partnership real estate.* The judgment further provided that in the event such deed was not delivered within ten days after defendants paid the money into the court, the judgment should constitute a good and sufficient conveyance of plaintiff's interest in the real estate. It further provided that all of plaintiff's right, title, and interest in and to the personal property of the partnership should be transferred to defendants, upon the payment of the judgment money into court. From this judgment the plaintiff appealed, his third assignment of error being that all of the property should have been sold and the net proceeds distributed in accordance with the interest of each partner. Overruling the plaintiff's third assignment of error, and in affirming the judgment, the Court stated:

> "Appellant's third contention of error as previously stated is that all of the property should have been sold and the net proceeds distributed in accordance with the interest of the partners. "Diligent search of the record discloses no objection to the method of distribution employed. Judging from the entire procedure and the introduction of evidence on values, it appears that this very method of settlement was contemplated by all parties concerned. This case was plainly tried upon the theory of fixing the value of the partnership property as a basis for distribution. No objection appears to have been made concerning that theory. . . . Had appellant's present objection been made at the trial, the court might have ordered the sale of the property; *but it was not obliged to do so. It was competent for the court, sitting as a court of equity, to adjudge the disposition of the partnership property, to order conveyances of partnership property, and to make division of partnership assets.*"[8] (Emphasis added.)

The authority of the above case for this point, however, may be somewhat impaired because the court seems to have put its decision on alternative grounds, not only that a court of equity is not obliged to order a sale of partnership property and may order a conveyance between the partners, but also on the ground that the plaintiff in this case did not ask for a sale in the lower court. The case is important, however, for the strong statements made by the court that a court of equity is not obliged in all instances to order a general sale of partnership property on dissolution.

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[8] *Id.* at 582, 50 P.2d at 936.

The next case is *Turken v. Olshanski.*[9] In this case the parties had formed a partnership for the sale of coal and coke in 1919, and, for the next three years, the partnership was conducted on a very unstable basis. The partnership property consisted of land and other things. In May, 1922, the defendant voluntarily withdrew from participation in the partnership business, and the plaintiffs, the remaining partners, soon after sought to secure from him an assignment of his interest in the contract (the land had been purchased on contract but had not been entirely paid for at this time), but the defendant refused to execute such an assignment. Thereupon, the remaining partners filed this bill of complaint, alleging the withdrawal of the defendant, and praying for a dissolution of the partnership and for an accounting. They also asked that the defendant be required to quitclaim to them his interest in the land described in the land contract above referred to. The defendant answered, and by way of cross-bill alleged that certain real estate had been purchased with monies of the company in the name of one of the plaintiffs and that it then had large assets over its liabilities and prayed that an accounting be had, *the property sold,* the firm dissolved, and that he be decreed to be the owner of a one-third interest in its assets. It was shown that the partnership agreement provided that in the event of a retirement of a partner, he "shall be entitled to all monies that he might have contracted to said co-partnership and shall be entitled to one-fifth of all profits and increase or such equal parts as there are partners in said co-partnership."[10] The trial court found that the defendant had voluntarily withdrawn from the partnership, and decreed that defendant was entitled to one-third of all of the profits theretofore made including any increase in the value of the real estate, and was chargeable with one-third of all of the losses, and ordered a referee to ascertain same, after which a supplemental decree would be made. From this decree both parties appealed. The defendant contended that he was entitled to a sale of the partnership assets, and the court apparently denied this claim on alternative grounds: (1) because the defendant had voluntarily withdrawn from the partnership, and (2) because the partnership agreement provided for the rights of a partner in the event of retirement, which provision did not include a right to the sale of the partnership assets. The Court said the following in this case:

> "We are impressed that the decree entered is fair and equitable. The claim of defendant that he left because he was ill-treated by plaintiffs is not supported by the proofs. It is apparent that he quit the business of the firm, because it was not profitable and he believed he could make more money at other work.
> "The defendant is not entitled to a decree of dissolution and a sale of the partnership assets. The partnership agreement pro-

[9] *Supra* note 6.
[10] *Id.* at 623, 212 N.W. at 962.

vided that, in the event of the retirement of a partner:
"He 'shall be entitled to all moneys that he may have contributed to said copartnership, and shall be entitled to one-fifth of all profits and increase of such equal part as there are partners in said copartnership.' "[11]

The next case, *Dow v. Beals*,[12] is not much authority for our point, since it is based on a New York statute[13] which dispenses with the liquidating sale of partnership assets on dissolution in certain specified situations. This case is included in this article because it shows that the New York Legislature and courts recognize that there are instances when a liquidating sale of the assets is not fair to all of the partners concerned. A partnership agreement between the plaintiff and the defendants had been entered into in 1916, and thereafter a corporation had been formed to carry out the business contemplated in the partnership agreement. In 1930, the defendants excluded the plaintiff from any participation in the conduct of the defendant corporation, which exclusion constituted a violation of the copartnership agreement, and for this reason the plaintiff filed his suit for the dissolution of the partnership and for an accounting among the partners. It is not shown whether the plaintiff or the defendants asked for a liquidation sale of the partnership assets, but the issue was raised before the court, and the court held that because of the abnormal business conditions which existed at this time it would be inequitable to the plaintiff, the innocent partner, to order a liquidating sale and that the court had the power under the New York statute[14] to dispense with a liquidating sale. The court then said:

"The question of a proper and equitable dissolution is perplexing, particularly in these abnormal times. The plaintiff, through no fault on his part and through the improper actions of the defendants, finds himself in the position of having a partnership dissolved. There must be an accounting. There should be no sale in this case as it would be practically confiscation to the plaintiff who stands innocent in these transactions to have a judicial sale of the assets of the partnership.
"Such power to dispense with a judicial sale is given by the provisions of the Partnership Law, Sections 75 and 69. The portions of these sections referring to the procedure to be adopted in this action are clearly remedial in character. They do not impair any contract rights, and they fix only the method of procedure.
"The court believes that the plaintiff should continue the business until the final accounting between the parties under the same conditions and with the same undertaking that he has given pursuant to the order of this court. The plaintiff should be entitled to all rights of all three partners in the partnership, including the stock

[11] *Ibid.*
[12] *Supra* note 6.
[13] N. Y. PARTNERSHIP LAW §§ 69, 75.
[14] *Ibid.*

> in the defendant corporation, provided that he pay to the defendants George B. Hill and Allen Beals in cash the amount of their interest, less any damages that may be found to be due from them to the plaintiff in this matter. In so fixing value the good will of the business should not be considered."[15]

In addition, it is clear: (1) that the surviving partner may maintain an equity suit for an accounting and decree against the deceased partner's personal representative or for relief not obtainable in common law, and (2) the court of equity will enforce a settlement between a surviving partner and the representative of the deceased partner and will adjudicate his rights as against the estate of the deceased partner.[16] But the conclusion is inescapable that, though as to retiring partners or partners at fault, equity has at times forced them to sell their interest to the remaining partners, no case or statute has been found under which equity will force a deceased partner's representative to sell his partnership interest or his interest in the partnership assets to the surviving partners. Instead it will order a liquidation sale of the assets and a division of the proceeds in accordance with the partnership interests.

But if anyone should desire to test the question in a Mississippi court, it is suggested that there be noted those cases which hold that in such a suit it is not necessary for the surviving partner to make the heirs of the decedent partner parties defendant to the suit together with the personal representative of the deceased partner. The decedent partner's representative will be sufficient representative of the interest of the heirs, and a suit against him will be binding on them.[17] Finally, if the surviving partners wish to pray in the contemplated suit for a purchase of the partnership's assets, as distinguished from a purchase of the decedent's interest in the partnerhip, then it is suggested that the surviving partners waive their rights under the Mississippi statutes to manage the assets of the partnership in dissolution and to give bond as required by statute, and that they permit the representative of the decedent's estate to manage the partnership in dissolution, or that a receiver be prayed for to take all the assets and sell the same since there is a split of authority as to whether a surviving partner, who is managing the assets of the partnership and dissolution, may purchase these assets at a sale conducted by himself, even where the sale is a judicial one under the supervision of the court.[18]

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[15]Dow v. Beals, *supra* note 6, at 631, 268 N.Y. Supp. 427.

[16]Link v. Haire, 82 Mont. 406, 267 Pac. 952 (1928); Gelphman v. Gelphman, *supra* note 6.

[17]James v. Wade, 200 Ark. 786, 141 S.W.2d 13 (1940).

[18]Murphy v. Murphy, 152 Kan. 810, 107 P.2d 700 (1941); James v. Wade, *supra* note 17.

In conclusion, because there are a number of readily conceivable situations in which a general liquidation sale could materially harm the surviving partners, it is suggested that whenever articles of partnership are prepared that the question as to disposition of a decedent partner's interest be thoroughly covered. If it is not covered in the articles of partnership, then it might be taken care of in the respective wills of the partners. Furthermore, the question is raised whether or not some legislation for protection of surviving partners, as well as the estate of a decedent, would not be advisable.[19]

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[19]Ohio G. C. §§ 8085-8089.

UNIFORM TRUST RECEIPTS ACT

*Will S. Henley**

The Legislature of the State of Mississippi enacted the Uniform Trust Receipts Act in 1950, and the same appears as Chapter 331, Laws of Mississippi, 1950.[1] This Act was approved April 14, 1950, and became effective thirty days thereafter.

The law pertaining to trust receipts is of comparatively recent origin. The term itself seems to have come into common use within the past fifty years. The earliest use of the term, "trust receipt," is found in the American case of *Barry v. Boniger*.[2]

The use of trust receipts arose as a convenient method of financing importations. Banks would finance the importation of merchandise by taking the bill of lading direct to itself, thereby vesting title to the merchandise in the bank and endorsing or delivering the bill of lading to the importer to enable him to obtain possession of the goods and, at the same time, taking a trust receipt in exchange for the shipping documents. Such trust receipt would ordinarily specify that the goods are held in trust for the banker as his property with the privilege on the part of the importer to sell the same for the banker's account, to keep the goods and proceeds separate and capable of identification, and to account for the goods or their proceeds. The trust receipt further provides that the banker may, at any time, cancel the trust and repossess the property covered by the trust receipt. The true function of a trust receipt was to enable a banker to finance a loan for the importation of merchandise by a merchant, or the domestic purchase of such merchandise. Credit is usually given by the banker to the foreign or domestic seller of the merchandise by means of a letter of credit. The bill of lading for the goods is sent to the banker who then delivers it to the buyer under a trust receipt for the purpose of obtaining merchandise entered at the custom house or placed in a warehouse, for the purpose of its sale in bulk, or for the purpose of its being manufactured into salable articles. In every case the banker retains title as security for his loan, and the buyer is given possession of the bill of lading merely to accomplish a specific purpose.[3]

With the development of the automobile industry, trust receipts have come into general use for the purpose of financing the marketing of automobiles. The purchase of cars by the dealer from the manufacturer or distributor is financed by a corporation advancing in whole or in

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[1]Miss. Code §§ 5080-01—5080-23 (1942).

[2]46 Md. 59 (1876).

[3]Jordan v. Federal Trust Co. (D.Mass. 1924). See Note, 49 A.L.R. 282, 87 A.L.R. 302, 101 A.L.R. 454, 168 A.L.R. 359.

part, the purchase price and taking title to the cars. Trust receipts have also been used frequently for financing dealers in other types of merchandise and securities.

As originally used, a trust receipt contemplated a triparte arrangement whereby the banker would acquire the actual title and constructive possession of the merchandise directly from the owner of the property and would then entrust the property to its customer as a trustee. Under subsequent developments, the financial institution usually does not acquire the title from the producers or manufacturers; it acquires its title or security interest from the trustee in a transaction solely between two parties. This practice is specifically authorized by the Uniform Trust Receipts Act.

The mass production of automobiles, trucks and labor-saving devices resulted in numerous decisions construing transactions under trust receipts. Such decisions were frequently in conflict and caused much confusion.[4]

The differences among the decisions led to the tentative adoption in 1930 by the National Commissioners on Uniform State Laws of a Uniform Trust Receipts Act. The Commissioners pointed out, "the protection now afforded trust receipts in the jurisdictions which recognize them is inconveniently wide in recognizing their validity even though secret; and at the same time inconveniently narrow in that such protection is now dependent upon the lender's acquiring title from a third party seller."[5] The American Bar Association approved the report of the National Commissioners on Uniform State Laws. And in 1933, the Commissioners promulgated the Uniform Trust Receipts Act.[6] This Act has now been adopted in 27 states.[7]

The validity of the Uniform Trust Receipts Act has been consistently upheld. Furthermore, it has been held to be constitutional.[8] Although Section 22 of the Act provides for the repeal of all acts or parts of acts inconsistent with this Act, it has been held that the Uniform Trust Receipts Act does not by implication repeal statutes dealing, in general, with chattel moragages and bulk sales as trust receipts constitute the only types of security interest governed by such statute.[9] This statute has been held to be in derogation of common law and subject to strict construction,

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[4]See Note, 49 A.L.R. 282 (1927); 87 A.L.R. 302 (1933); 101 A.L.R. 454 (1936); 168 A.L.R. 359 (1947).

[5] See Note, 87 A.L.R. 302, 303 (1933).

[6]Uniform Trust Receipts Act, 9 A.U.L.A.

[7]Henley, *Uniform Law in California,* 39 Cal. L. Rev. 68 (1951).

[8]*In re* Boswell, 20 F. Supp. 748 (S.D. Cal. 1937), *aff'd,* 96 F.2d 239 (9th Cir. 1938).

[9]Chichester v. Commercial Credit Co., 37 Cal. App.2d 439, 99 P.2d 1083 (1940).

but, in cases of doubt, that construction which accords with the common law should prevail.[10]

It should be noted that trust receipts, as provided for by the Uniform Trust Receipts Act, are applicable only in certain instances. Section 15 provides, "this act shall not apply to single transactions of legal or equitable pledge, not constituting a course of business . . ." This would seem to limit the use of such financing to dealers or at least to situations where a series of transactions were contemplated and would not permit the substitution of the use of trust receipts for chattel mortgages in isolated transactions. Section 14 limits the obligations that may be secured by a trust receipt to "any new value given" or any obligation that is at the time of the transaction already secured by a lien in favor of the entruster on the property to be covered by the trust receipt. It would, therefore, appear that trust receipt financing should be limited to specific property and that the customary clauses, providing that liens in favor of a financial institution secures any and all debts due or that may hereafter become due to such institution, would not be applicable to trust receipt financing.

However, where a trust receipt on several automobiles or other articles is given to secure a specific indebtedness and part of the security is lost or proceeds not accounted for, the remaining articles entrusted may be held for the entire debt even though the trustee was authorized to sell said property for a specific price. The right of an entruster is recognized as being only a security interest and the title and right of possession remains in the trustee prior to default. Purchasers in the usual course of business in good faith are protected under the provision of Section 9 of the Act. In other words, where a customer purchases an automobile from a dealer, the finance company holding a trust receipt loses its lien or security interest in the automobile or other entrusted property insofar as the purchaser is concerned and must look to the proceeds of the property for its protection.

Under the provisions of Section 10 of the Act, an entruster is entitled to the proceeds of any disposition of the goods, documents or instruments as security for its debt provided such proceeds are received by the trustee within ten days prior to application for appointment of receiver or the filing of petition in bankruptcy unless such provision has been waived by the entruster by words or conduct. Knowledge of the existence of the proceeds without demand for accounting made within ten days from the date of such knowledge constitutes a waiver. It, therefore, ap-

[10]C.I.T. Corp. v. Commercial Bank of Patterson, 64 Cal. App. 2d 722, 149 P.2d 439 (1944); McKesson-Fuller-Morrison v. Chappell Ice Cream Co., 285 Ill. App. 472, 2 N.E.2d 561 (1936); Universal Discount Corp. v. Brooks, 115 Ind. App. 591, 58 N.E.2d 369 (1944).

pears that an entruster is required to demand a strict and prompt accounting or that he may otherwise waive his rights to the proceeds of property sold under a trust receipt.

Under the provisions of Section 11 of the Act, the security interest of the entruster appears to be subordinate to other contractual liens incident to the processing, warehousing or shipping of the entrusted property. The right of an entruster appears to be superior to a trustee in bankruptcy.[11] An interesting question arises in the State of Mississippi as to what effect the Uniform Trust Receipts Act has upon Section 273 of the Mississippi Code of 1942, commonly known as the "sign" statute. In a recent case[12] in the bankruptcy court the Uniform Trust Receipts Act in Mississippi has been upheld, and it would appear that the same has the effect of modifying Section 273 of the Mississippi Code of 1942, so as to make valid the usual "floor-financing plan" of automobile dealers that was formerly held to be void under the "sign" statute.[13]

Under the provisions of Section 6 of the Act, the proceeds of the sale of property repossessed shall be applied:

> "(1) to the payment of the expenses thereof, (2) to the payment of the expenses of re-taking, keeping and storing the goods, documents, or instruments, and (3) to the satisfaction of the trustee's indebtedness. The trustee shall receive any surplus and shall be liable to the entruster for any deficiency."

Such expenses have been held to include attorney's fees.[14]

A bankrupt had possession of claimants' merchandise under trust receipts or bailment leases, neither of which required bankrupt to carry insurance on merchandise. He took out fire insurance by policies providing that insurance was on bankrupt's interest in and on his legal liability for property of others which was in his possession. There was no evidence of negligence by the bankrupt in connection with the fire which destroyed the merchandise, and bankrupt had no legal interest in it. On such state of facts claimants had no rights in the insurance money collected by bankruptcy trustee from insurers under said policies, notwithstanding that insurers' settlement with trustee might have been made upon basis of full value of merchandise destroyed and not merely that which belonged to bankrupt.[15]

An interesting question of construction arises with respect to the provisions as to recordation. Section 13 (2) sets out the statement of trust

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[11] *In re* Bell Motor Co., 45 F.2d 19 (8th Cir. 1930), *In re* James, Inc., 30 F.2d 555 (2d Cir. 1929), *reversing* 30 F.2d 551 (N.D.N.Y. 1927).

[12] In the matter of B. & B. Motor Co. and B. & B. Implement Co. in Bankruptcy, No. 3963, in the Southern District of Mississippi.

[13] *In re* Waynesboro Motor Co., 60 F.2d 668 (S.D. Miss. 1932).

[14] C.I.T. Corp. v. Commercial Bank of Patterson, *supra* note 11.

[15] *In re* Podolsky, 115 F.2d 965 (3rd Cir. 1940).

receipt financing which shall suffice for the purpose of the Act. Such statement does not contain any reference to an acknowledgment. However, Section 856, Mississippi Code of 1942, provides in part, "any writing conveying personal estate, shall not be admitted to record in the clerk's office unless the execution thereof be first acknowledged . . ." It is quite possible that the Mississippi Supreme Court may construe the two statutes together as requiring an acknowledgment before the statement could be recorded. If such construction should be placed on the statute, failure to acknowledge the statement would be fatal and the statement would not be entitled to be recorded and, therefore, would not be notice, and claims of other creditors would be prior to the trust receipt. Until this question is settled, it is believed that the safe policy is to require an acknowledgment on statements of trust receipt financing.

FARM OWNERSHIPS YIELD FEDERAL INCOME TAX SAVINGS IN LEGITIMATE CASES

*Joseph Berman**

Only recently I noted with interest that a good many businessmen, columnists, writers and other people in high income tax brackets are joining the back-to-the-farm movement.

Farm investors can reap some substantial tax advantages as well as other benefits by living close to the land, but it is very important that in all cases that taxpayer shall be able to prove that his intent in buying the land and engaging in farming is for a profit and not as a hobby.

A taxpayer who runs his farm merely as a country home or a place where he intends to spend his vacations, will lose the special tax benefits enjoyed by legitimate farmers.[1]

As a general proposition, the courts as well as the Bureau of Internal Revenue are governed in all these cases by the question of what was the taxpayer's intent.

This does not mean that his venture must show a profit in any particular year. The main point in determining intent would be the determination of the factual question as to whether or not the venture was entered into as a tax evasion device,—otherwise the taxpayer's losses can be used to offset other income.

The ordinary shrewd investor in most of these cases buys a farm that needs rehabilitation and was previously operated at a loss. The first few years of operation, the outlay would naturally be high and income low. Taxpayer in such cases usually operates the farm in his own or his wife's name; he is thereby enabled to deduct fully his operating costs as an offset to his or his wife's other personal income from other sources.

As the farm becomes profitable and begins to come out of the red, the taxpayer usually incorporates his or her farm business. The corporation then uses the profits in paying off the mortgage on the property, and the corporation then becomes liable for the income tax on the farm, thereby relieving the farmer individual owner of tax liability.

Important decisions can be made in operating a farm as a corporation or partnership. Tax savings can be effectuated equally as well on a farm income as a business income since the same tax savings apply generally to both. Also estate planning is as important to farmers as to all other people, generally, in the same income and estate brackets.

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[1]William J. Peter, T.C. MEMO. OP. DKT. 12873 (Sept. 16, 1948).

Money invested in improving a farm is as a rule well spent—and in some instances not likely to be taxed. The farm's value increases considerably with improvements made, and then a tax will be paid on its sale-at-capital gains tax rates, if it falls within the provisions of the law governing it.

Otherwise, if the farm is kept during taxpayer's entire life, inheritance taxes will have to be paid on his whole estate, and the farm thereby may escape the gains tax in the spread between its original book value and its market value at taxpayer's demise. Its higher value at taxpayer's death may become the new tax cost for a new cycle of depreciation.

In case of exchange of farms there is no capital gains tax, even if in the exchange a better farm is obtained than the one originally purchased. As you can see from the previous discussion there is no tax on the improvements made. In case the farm is sold at a loss, the entire loss can be deducted against and from the income.[2]

Usually when a so called "gentleman farmer" decides to deduct the losses sustained on his farm from personal income received from other sources, the Bureau of Internal Revenue becomes suspicious of his true status as a farmer and begins to question it. It will not allow such deductions where the farm is run merely as a hobby, diversion or as a deliberate tax loss.

The tax court as a rule does not insist that the taxpayer be a full-time farmer or that the farm not have more recreational and social facilities than the common run-of-the-mill farm. Furthermore, it is advantageous for the taxpayer to consider whether or not:

1. There are considerable receipts from farm sales;

2. Farm losses are decreasing;

3. Improvements are made on the farm to increase efficient operation and cut expenses;

4. Experienced men are in charge of the farm;

5. Experts are consulted in order to cut losses and improve income;

6. Complete, detailed and proper accounting and bookkeeping is had;

7. Unsuccessful transactions are forsaken and replaced by others that might bring in larger income;

8. Taxpayer devotes a great deal of personal attention to the farm;

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[2]Albright v. U.S., 173 F.2d 339 (8th Cir. 1949), *rev'g* 75 F. Supp. 532 (D.C. Minn. 1948); I.T. 3843; C.B. 1947-1 p. 12.

9. Taxpayer's household is charged with the market price for farm products used; and whether or not

10. The farm manager shares in the profits.

An important decisive factor in all these cases is the clear intention—not merely the hope—of running the farm profitably. This is usually indicated if large quantities of produce are sold at prevailing market rates and business principles and practices are followed in running the farm. Relief is mostly denied in cases where heavy losses are the rule and the realization of profits problematical.

In a recent case[3] the tax court ruled that taxpayer must at least plan that the farm yield a profit in the future; and, that in the paricular case before it, the taxpayer only hoped to run the farm profitably and had no real intention of running the farm profitably.

The facts were that the proprietors of the farm, husband and wife, had substantial outside sources of income. They used the 20-30 room house and 7 baths on the farm as their residence, it being within commuting distance from husband's principal place of business.

The farm, purchased in 1935, had 5 cows and a bull and by 1940 the herd increased to 29 and in 1947 to 41. The proprietors were advised that the farm could not be run profitably with less than 150 head of cattle, which the farm could support without any additional expense, but they did not avail themselves of the advice given them.

The court stated that "early losses are expected, but continuous operation at a loss leads to suspicion that the operation of the farm lacked in this case the profit motive."

In another case,[4] losses were disallowed by the court when it decided that the farmer was only keeping it as a country home for his family and did not make any attempt to make a profit.

This case concerns a lawyer who intended to retire from practice. He purchased a farm, but subsequently continued his practice. His family spent their summers on the farm, and he vacationed on it. The only active interest he took in the farm was in instructing his hired farmer occasionally. For 13 consecutive years there were either losses or no farming was done at all, but, in the tax year involved the proprietor bought seed, stock, farm equipment, and employed a sharecropper.

In view of all these facts, the court found that only an "incorrigible optimist" could under the circumstances expect any profits from his farm.

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[3]Deering v. Blair, 23 F.2d 975 (D.C. Cir. 1928).

[4]Morton v. Comm. of Int. Rev., 174 F.2d 302 (1949), *cert. den.*, 338 U.S. 828 (1949).

In another case,[5] the court took an opposite attitude and allowed deduction of losses where a farmer lost money in operating his farm for fourteen consecutive years.

The facts were that the farmer increased his pasturage and cultivated land from 75 to 95 acres, employed an experienced farmer to operate it under his supervision, and improved the land by fertilizer, reclamation and soil conservation. He also experimented with various types of farming in search of profits as breeding beef cattle, growing corn, hay and wheat and raising sheep and hogs. As proprietor, he worked weekends on the farm, repairing buildings and equipment, spraying the orchard and feeding the poultry. Furthermore, he was regularly in consultation with his farmer on farm problems, and spent money repairing buildings and buying equipment for useful purposes rather than for the beautification of it. In addition, the proprietor had his home on it, and kept a separate accounting and bookkeeping account for the farm and his home, and confined his social activities to his home. He included in his farm income the products consumed by his family and charged regular prices for it.

For the businessman inclined to effectuate tax savings and long range capital gains instead of income, cattle raising and timber growing has its advantages.

Cattle have two ways of appreciating in value, through calving and increase in weight. Taxes in such cases are not payable until cattle are sold. Cost of raising them is deductible in the meantime.

Upon the sale of beef or dairy animals owned for one year or more, a capital gains tax is payable on the profit made. A loss is fully offsetable against other income derived.

The above rule applies to all breeding animals except poultry. There is however a restriction—that sales are not made in the regular course of business and taxpayer is not raising them for sale to customers, otherwise you can cut your breeding herd as you deem it essential.

Income can be deferred or used as deemed necessary as above stated.

Part of farm can be used for timber production, with a minimum initial expenditure and the chance of building up future values. In such case a tax is not payable annually on the increase in value of the growing trees. Upon the sale of the standing timber, taxpayer pays a capital gains tax. As to trees cut for sale as firewood, logs, lumber or poles the chances are that they will be subjected to regular income tax payments.[6]

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[5]Comm. of Int. Rev. v. Field, 67 F.2d 876 (2nd Cir. 1933).
[6]See MERTINS LAW OF FEDERAL INCOME TAXES 354-356 and 1951 Supp. 212-214.

Another tax saving method at present available to business is LIFO—the last-in-first-out method of measuring changes in inventories. It lowers the level of gross profits and thereby lowers taxpayer's tax bill.[7]

It is based on the theory that a certain quantity of stock must always be on hand to be able to conduct one's business. In regularly conducting a business, goods are bought, processed or sold. To determine the correct cost of operation they must be considered as the same goods that were bought at a certain month or year in order to determine the cost of operation for that particular month or year.

Under LIFO we assume that the last goods bought are the first sold, since the goods are goods on top of the pile they are sold first and the bottom ones last.

Congress in 1938 and in 1939 permitted the general use of LIFO. It was first applied to raw materials as coal, copper, crude oil, etc., since every barrel, pound or ton was like every other barrel, pound or ton.

In 1941 the National Retail Dry Goods Association set up a series of department price indices so as to be able to answer the question as to prices on inventories and to be able to tell what inventory prices are due to price fluctuations or to changes of quality or style. A few of its department store members used LIFO and in 1947 the Tax Court upheld them in spite of Treasury opposition.

In a survey of annual reports made by the American Institute of Accountants in 1950, LIFO was leading as a method of pricing inventories; approximately one-third of the concerns surveyed used it.

It was a good idea to use LIFO in the 1940's, but it is an even better idea today when prices doubled or trebled since the law put it into effect. Accountants and companies using it, admit it is used as a tax saving device in a period of rising prices and increasing tax rates.

It is also used for the purpose of eliminating fluctuations in reports of profits due entirely to changes in value of inventories. It tends to reduce earnings in an inflation period and increases them during depressions. Over a period of time it levels off valleys and peaks. It minimizes the effect of "inventory profits" during increases in prices and "inventory losses" during depressions but it has its risks since it cuts taxes when price are rising and boosts them when prices drop.

In order to take advantage of LIFO, a statement of election must be filed, and it must be used for other reasons than tax purposes only. Once an election is made to use it, it must be subsequently followed.

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[7]Sec. 29.22 (d)-1.

With rates at an all time peak for most tax payers, it is very expensive to overlook a single deduction. Since tax reductions are of vital significance to everyone, some of the more important Personal Deductions are: (1) Alimony; (2) Apartment, residential, loss subletting; (3) Automobiles: property damage from it; (4) Bad debts; (5) Worthless Bonds; (6) Burglary losses not compensated by insurance; (7) State Drivers License; (8) Expenses actually incurred by members of the Civilian Defense Corps, or Voluntary Red Cross workers are deductible as charitable contributions; (9) Discount on FHA loans; (10) Fire losses not compensated by insurance; (11) Flood losses not compensated by insurance; (12) Payments by guarantors; (13) Casualty damage on household furniture not compensated by insurance; (14) Hurricane damage; (15) Interest on taxes and tax penalties; (16) Labor union dues and assessments for noninsurance purposes; (17) Losses (not covered by insurance); (18) Residence damage to trees not covered by insurance; (19) Cost of preparing income tax returns; (20) Safe deposit boxes used for income securities; (21) Separation payments (periodic) to wife; (22) Storm losses not covered by insurance.

Business and Professional Deductions (connected with production of taxable income):
(1) Abandoned assets; (a) architect's plans, obsolete, (b) business catalogue; (2) Advance commissions and other advances to employees, charged off as compensation or as uncollectible; (3) Amortization; (4) Attendance at professional meetings, conventions; (5) Automobiles, insurance, gasoline and oil, loss on sale of, parking meter charges, depreciation, repairs, State inspection and registration fees; (6) Experiments, abandonment of it, if unsuccessful; (7) Costs of Fidelity Bonds; (8) Insurance Premiums; (9) Stationery and Supplies; (10) Subscription to professional journals and magazines; (11) Telephone, telegraph expenses, including necessary phones in homes of executives; (12) Office: Part of your home expenses are deductible if you have an office at home; (13) Breakage losses; (14) Dues to Chambers of Commerce; (15) Christmas gifts to employees and customers; (16) Contributions to Civic Organizations; (17) Club dues; (18) Contributions for publicity, to create good will and increased business; (19) Attorneys fees of corporate officers; (20) Cost of Court proceedings, except when guilty of criminal offense; (21) Cancellation of employees debts; (22) Director's expense; (23) Dues; (24) Entertainment expenses (at home too, if your wife kept a list); (25) Expenses of managing estate; (26) Tips; (27) Traveling expenses: baggage charges, fares, laundry, meals, and lodging (but if you maintain no permanent home the deduction must be reduced by what your living

expenses would have been if you had maintained one), passports, sample rooms, taxis, telephone, telegraph, tips.

If married, decide whether a joint return is better for you than separate returns.

Salesmen, doctors and those in their own business must choose carefully between the "standard" ten per-cent deduction and the long form itemization.

As to deductions for business and professional men, the tax blank only lists twelve kinds. I have listed herein about 48 more. This list is not complete but it is at least a step in the right direction.

Tax Exempt Income: Some of the commoner types are certain dividends on oil and mining stocks or from investment trusts. Even some interest bearing bonds have partially tax-free interest. If in doubt, call the issuing corporation or your broker for further information.**

**Other citations supporting this article are: YOUR FEDERAL INCOME TAX 61 (1949); Samuel Riker, Jr., Ex'r., 6 B.T.A. 890 (A); Plant. v. Walsh, 280 Fed. 722 (D.C. Conn. 1922); Norton L. Smith, 9 T.C. 1150 (A); George W. Cutting, T.C. MEMO. DKT. No. 12682 (Dec. 18, 1947); G.C.M. 2193, C.B. 1939-1, 164; Tatt v. Comm. of Int. Rev., 166 F.2d 697 (5th Cir. 1948); Louise Cheney, 25 B.T.A. 672; Irving Ackerman Co., 24 B.T.A. 512 *aff'd,* 71 F.2d 586 (9th Cir. 1934); Norton L. Smith, 9 T.C. 1150 (A); Reginal C. Vanderbilt v. Comm. of Int. Rev., 5 B.T.A. 1055, *aff'd,* Deering v. Blair, 23 F.2d 975 (D.C. Cir. 1928); Harry C. Fisher v. Comm. of Int. Rev., 29 B.T.A. 104, *aff'd* by *Per Curiam decision,* Fisher v. Comm. of Int. Rev., 74 F.2d 1014 (2nd Cir. 1925); Wilson v. Eisner, 282 Fed. 38 (2nd Cir. 1922); Comm. of Int. Rev. v. Widener, 33 F.2d 833 (3rd Cir. 1929); Smith v. Comm. of Int. Rev., 78 F.2d 408 (3rd Cir. 1935); Margaret E. Amory, 22 B.T.A. 1398 (A); James Clark, Ex'r., 24 B.T.A. 1235 (A); Laura M. Curtis, 28 B.T.A. 631 (A); Frank R. Fageol, T.C. MEMO. DKT. No. 25884 (April 30, 1951); Dan R. Hanna Jr., T. C. MEMO DKT. No. 25706 (June 6, 1951); Leland E. Rosemond, T.C. MEMO. DKT. No. 27947 (June 20, 1951).

State Bar Section

COMMENT ON *PER CURIAM DECISION*

*Ben Owen**

On October 9, 1950, The Mississippi Supreme Court, in *Rosenzweig v. Phillips*,[1] handed down a *per curiam* opinoin, affirming the case on both direct and cross appeals. The amount in litigation was relatively small, but I feel that the court erred in denying the direct appeal, and that the denial *per curiam* amounted to a denial of justice in a worthy cause.

A brief look at the facts shows that Rosenzweig, a landlord, began proceedings to enforce his landlord's lien against certain cotton held by Phillips. The cotton had been grown by Rosenzweig's two negro tenants, each of whom had a contract to pay him 1,000 pounds of rent cotton each year. After the cotton had been ginned at the gin of Hairston's brother, it came into the possession of Hairston, a merchant, who had furnished supplies to the negroes. Hairston in turn sold the cotton to Phillips, and Rosenzweig proceeded against the cotton by attaching the warehouse receipt in Phillips' possession. Phillips brought Hairston into the case, seeking recovery against him in the event the court upheld Rosenzweig's landlord's lien.

About the time the landlord filed his action, Edmond Blair, one of the tenants, brought Rosenzweig a bale of cotton and told him that Hairston had sent it and would pay off the rent claim if Rosenweig would send him the remainder of the amount due. Ben Taylor, the other tenant, later brought Rosenzweig $50 in cash, which he had derived from selling his last remnant of a bale of cotton.

When each tenant brought said payments to Rosenweig, Rosenweig reminded the tenant that he owed back rent for the preceding year, 1946. Each tenant agreed that his payment should be applied on 1946 rent instead of on current rent for 1947. Rosenzweig pressed his claim for the full 1,000 pounds from each tenant, and the lower court upheld his landlord's lien. But the court, without giving any reason for its action, also required that the two payments be applied on current rent, and that their value be deducted from the amount of the rent for 1947.

Rosenzweig appealed, claiming the court had no right to force the application of the two payments on 1947 rent against the expressed wish of the tenants. Appellee Phillips answered, claiming that Rosenzweig had coerced the negro tenants into applying their payments on the back rent account. Appellee Hairston answered, not mentioning any coercion on Rosenweig's part but contending that Hairston automatically was a surety for the payment of the rent, and, resultingly, had a right to be consulted on any application by Rosenzweig. A *per curiam* decision dismissed the appellant without telling him which appellee had given the "obvious" answer to his argument, and both appellees' answers were wholly inconsistent with each other.

The lower court rendered an elaborate written opinion, but failed to state why it was requiring the application on 1947 rent, as it did. It said merely that Phillips and Hairston claimed that "under the circumstances of this case" the two payments should be applied on 1947 rent and that the landlord would be required so to apply them.

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*Attorney at Law, Columbus, Mississippi.
[1]48 So.2d 126 (Miss. 1950).

In all deference to the Supreme Court, I submit that Rosenzweig is entitled to know why he was forced to apply the payments of his tenants to some other debt than the debt that he and the debtors agreed on. The lower court held against him in summary fashion without rhyme or reason, and the Supeme Court shed no light on the holding.

Actually, I feel that neither appellee presented a strong case. The law is uncontroverted that if there are two or more debts owed by a debtor to the same creditor, the debtor may apply a payment on whichever debt he desires.[2] 33 Miss. 445 (1857); Bain v. Williams, 10 S. & W. 113 (1848).

The appellee Phillips contended Rosenzweig forced or intimidated the negroes into making the applications of their debts to 1946 rent, and, incredible as it may seem, he quoted the following testimony of Edmond Blair, negro tenant, on cross-examination to prove Rosenweig's alleged intimidation:

Q "What did Mr. Rosenweig tell you concerning the check that Mr. Hairston was going to send?"

A "He asked me, 'Did he tell you that?'"

Q "And you told him that he did, and then what did he say?"

A "'You know you owe me back rent.' 'Yes, sir, I certainly does.' He say, 'I am not telling you to pay this on back rent, but I am leaving it to you if you want to pay on back rent.' 'Yes, sir, that suits me.'"

* * *

The above testimony proves a complete absence of force, but we quote the following testimony of Blair on cross-examination and it is conclusive:

Q Roszenweig asked you what you were going to do about the 1946 rent and that he couldn't make you pay it on the '46 rent, didn't he?"

A "Asked me if I wanted to pay it on the '46 or '47 rent."

Q "Didn't you tell him what you wanted to pay?"

A "He leave it to me. He minded me good if I wanted to put it on the back rent."

Q "But he said that you could do it, didn't he?"

A "He say, 'Now mind you good. I am not telling you to put it on the back rent. Letting you know that if you want to put it on back rent it is left with you.' 'Yes, sir, I want to pay the back rent.'"

* * *

Testimony by the other tenant is just as convincing that Rosenzweig exerted no coercion on the negroes. This other tenant had paid his landlord $50 cash, which the court required to be applied on 1947 rent ,and he stated as follows:

> "I paid Mr. Rosenweig $50.00. He didn't force me to pay it on the 1946. He said, 'You all owe me for '46,' and he asked me if I was willing to pay the money on 1946, and I told him 'yes.' He said wanted my consent and if I was satisfied to put it on '46, and I told him it was all right to apply it on '46."

* * *

On cross-examination Taylor testified clearly:

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[2]Aaronson v. McGowan, 181 Miss. 642, 180 So. 738 (1938); Chrisler v. McCoy, 33 Miss. 445, (1857). Bain v. Williams, 10 S.&W. 113 (1848).

A "Yes. Mr. Rosenzweig gives me understanding that he told me what I owed and showed me that he wouldn't force me to pay it and left it to me on my honor. I said I would be glad to pay it."

Q "You would do it because he asked you to, wouldn't you?"

A "Not all times. I would want to do what was right. He showed me where I owed back rent for 1946, and he didn't compel me to pay it. Just left me to do what I wanted to do about it."

* * *

The negroes' testimony could not have showed more plainly that they applied their payments to back rent freely and voluntarily—nothing to suggest coercion.

When Hairston in his brief claimed the right of a surety to be consulted as to application of payment, he jumped to an unwarranted conclusion. In his original answer he admitted knowing of the existence of the landlord's lien, feebly contending therein that "Rosenzweig attempted to waive his rent in order to obtain supplies for his tenants." Yet there is not one iota of testimony in the record as to any waiver by Rosenzweig. The record showed Hairston to be an unsecured creditor who had stepped in and seized the negroes' cotton in the face of the landlord's lien, after they had agreeably had it ginned at his brother's gin. According to the testimony, after Hairston summarily took the cotton into his possession at his brother's gin, he sent one bale of cotton in to Rosenzweig by the tenant, with instructions as to where the payment would be applied. It was not ever clear from whom the other tenant got the $50.00 cash, which he paid to his landlord and which was required to be applied on 1947 rent.

Just because Hairston, through his wrongful seizure of the cotton, became *liable* for the payment of said rent, he did not thereby also become a *surety* for its payment, entitled to the rights and privileges of a surety.

We respectfully submit that neither Phillips' "coercion" defense nor Hairston's "surety" defense has any merit, and that the appellant Rosenzweig was entitled to know which defense was so "obvious" as to warrant a *per curiam decision* against him, particularly in view of the lower court's giving no reason for forcing the application on certain debts in utter disregard of the voluntary direction given by the tenants.

LEGAL NOTICES

Notice of Regional Meetings of The National Association of Claimants' Compensation Attorneys: Home Office— 6 Beacon Street, Boston 8, Mass.

Southern Conference

Professor Hubert Winston Smith of Tulane will give another famous Law-Science Course at the Jung Hotel, New Orleans, Louisiana, beginning Wednesday, February 27, 1952, and ending Tuesday evening, March 4, 1952.

As usual all NACCA members are urged to attend, and a large attendance of NACCA Editors is practically assured, especially as our own annual Winter Meeting will be held the very next day in the same hotel, to-wit, on Wednesday, March 5, 1952. At this meeting the Gleason Lectures on Workmen's Compensation will be given by Professor Wex S. Malone of Louisiana State University, and some of the leading tort, railroad and admiralty lawyers will also speak.

We will be the guests of the NACCA of Louisiana, meeting at the Jung Hotel, New Orleans. Further information may be obtained from NACCA Editor Senator H. Alva Brumfield, Louisiana Nat'l Bank Bldg., Baton Rouge, La.

Southeastern Conference

On Friday, March 7, 1952 from 9 A.M. to 5 P.M. we will be the guests of NACCA of South Carolina, probably at a law school campus in Columbia.

For further information write NACCA Editor Senator James P. Mozingo, III, 117 North Main, Darlington, S. C.

The following day, Saturday, March 8, 1952, we will be the guests of NACCA of Virginia, at the Jefferson Hotel in Richmond, Va. For further information contact George E. Allen, Jr., c/o Allen, Allen & Allen, Mutual Bldg., Richmond 13, Va.

When final arrangements are made, you will get a definite notice; but we urge all NACCA Editors and leaders, as well as members, to arrange to come.

Samuel B. Horovitz
Editor-in-chief
NACCA

NOTES

MALPRACTICE IN MISSISSIPPI

Malpractice, defined in medical terms by Mr. Dorland,[1] is any "improper or injurious practice; unskillful and faulty medical or surgical treatment." Dr. Regan[2] defines malpractice "as the failure upon the part of a physician or dentist properly to perform the duty which devolves upon him in his professional relation to his patient, a failure which results in some injury to the patient." In legal terms, Mr. Black[3] defines malpractice as any "bad, wrong, or injudicious treatment of a patient, professionally in respect to the particular disease or injury, resulting in injury, unnecessary suffering, or death to the patient, and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent." On reading the reported cases in Mississippi on malpractice it at once becomes apparent that the court in dealing with the element of malpractice always uses the word negligence in connection therewith. Therefore, in order for an attorney to establish a legal claim of malpractice, it is essential that negligence on the part of the physician, nurse, dentist, technician, and hospital be proved. In proving negligence, it must be remembered that the defendant always has available the defense that his conduct was not the proximate cause of the deceased's death or injury.[4]

Defense of Proximate Cause

In the case of *Berryhill v. Nichols*,[5] the Mississippi Supreme Court shows the application of the proximate cause doctrine. In this case the deceased had been injured by gunshot wound and died from pulmonary embolism while under treatment. Action was brought under the wrongful death statute[6] against the physician. The Court held that under this statute it is essential that the negligence complained of shall be the proximate cause, or at least a directly contributing cause, of the death which is the subject of the suit. The Court held that the gunshot wound and not the defendant's treatment was the proximate cause of the death.

Application of Res Ipsa Loquitur

In all cases of negligence, it is a question for the jury as to whether the particular act was done negligently or not. This is also true in an action of malpractice.[7] In this connection the doctrine of res ipsa loquitur plays an important part in proving negligence. The Mississippi Supreme Court has held[8] that there is a class of cases where the facts of occurrence warrant the inference of negligence. It is not that the facts compel such an inference, but they furnish circumstantial evidence of negligence where direct evidence of it may be lacking. However, to bring the doctrine of res ipsa loquitur into application, there must be a showing as to the cause of the death or injury.[9] The doctrine never supplies the proximate cause; it is in operation by a showing thereof.[10] The Mississippi Supreme Court has

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[1]Dorland, W. A., The American Illustrated Medical Dictionary (22nd ed. 1951).
[2]Regan, L. J., Doctor and Patient and the Law, p. 17 (2nd ed.).
[3]Black, Law Dictionary (3rd ed. 1933).
[4]Berryhill et al. v. Nichols, 171 Miss. 769, 158 So. 817 (1935).
[5]*Supra* note 4.
[6]Miss. Code § 510 (1930): See Miss. Code § 1453 (1942).
[7]Maxie et al. v. Laurel General Hospital, 130 Miss. 246, 93 So. 817 (1922).
[8]Waddle v. Sutherland, 156 Miss. 540, 126 So. 201 (1930).
[9]Sanders v. Smith, 200 Miss. 551, 27 So.2d 889 (1946).
[10]*Supra* note 9.

held that the doctrine does not create a case of absolute liability, but it simply raises the presumption or makes out a prima facie case of negligence to the extent that the defendant is called upon to meet it with an explanation. The same result is effected under the general rules applying to circumstantial evidence.[11] It is commonly known that some situations arise in malpractice suits that would be almost impossible to prove because of the absence of witnesses at the scene, and also because of the reluctance of physicians to testify against each other. Therefore, the prudent attorney should urge the Court to apply the dotrine whenever the need arises.

Other Defenses

From the above it might seem that the physician, nurse, dentist, technician, and hospital do not have a valid defense available. It is a settled law in Mississippi that one physician can testify regarding the carefulness and skillfulness of another physician. This testimony is admissible as evidence.[12]. In the cited case, however, his want of care and skill was alleged in the declaration, thereby putting his possession of such skill and care in issue. This Court did not say such evidence of carefulness and skillfulness would be admissible in the absence of such allegations. But, it seems, that in all such cases of malpractice or negligence, such an allegation would almost be a prerequisite to a valid declaration. In *Unger v. Grimsley*[13] it was held that evidence of injury of the same type to another patient two years after injury to plaintiff, was inadmissible. However, in that case, the defendant was using a different X-Ray machine at the time of the second injury. If the same machine that had caused the injury to the plaintiff had caused injury to a second person two years later, would such evidence be admissible?

Breach of Contract

It is to be noted that a physician can be liable for breach of contract. In *Hood v. Moffett*[14] the plaintiff had contracted with defendant physician to deliver her child. When plaintiff was in labor, she sent for defendant who did not come until the next day. Defendant alleged as a defense that he was bringing another child into the world at the time plaintiff wanted him and it was impossible for him to come. The Court held that where a person assumes obligations to different parties, the performance of which may be incompatible with each other, both parties having equal rights to his services, it is not an excuse for a default as to one party that both obligations could not be performed. Here, defendant had a choice of two duties: (1) he could send another physician, or (2) he could come himself. Since he did neither he is liable for the injury sustained by plaintiff.

Liability of Hospitals

In regard to the liability of a hospital for injuries sustained by the patient, the Mississippi Supreme Court has held that a patient is generally admitted to a hospital conducted for private gain[15] under either an express or implied obligation that he

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[11]Palmer v. Clarksdale Hospital, 206 Miss. 680, 40 So.2d 582 (1949).
[12]Shaw v. Klein, 121 Miss 411, 83 So. 620 (1920).
[13]Unger v. Grimsley, 138 Miss. 591, 103 So. 341 (1925).
[14]Hood v. Moffett, 109 Miss. 757, 69 So. 664 (1915).
[15]Under the recent decision handed down in *Mississippi Baptist Hospital v. Holmes,* 55 So.2d 142 (Miss. 1951), it would seem that this rule has been extended to cover paying patients in a charity hospital. However, for charity patients, the rule is not changed. See: Comment, 20 Miss. L.J. 398 (1949); Note, *Liability of Charitable Hospitals for the Negligence of Servants Resulting in Injury to Patients,* 19 Miss. L.J. 220 (1948).

receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require.[16]

In addition to the above considerations, a private hospital is liable in damages for the negligence of its employees.[17] Since the recent decision of *Mississippi Baptist Hospital v. Holmes*,[18] a charity hospital is now liable in damages to a paying patient for the negligence of its employees. However, the attorney must always be aware of the dangers that are surely to arise when he is trying to prove that physicians or other technical personnel are employees of the hospital. This danger should be carefully avoided by presenting adequate proof to the Court that such physician or technical personnel is an employee of the hospital. Without such proof, the hospital may be able to escape liability on the ground that it was not the principal or employer of the negligent person.[19]

Examples

Two cases will suffice to illustrate what is generally classified as malpractice in Mississippi. In the case of *Saucier v. Ross*[20] the defendant had treated the plaintiff for an abscess. For drainage purposes, a rubber tube was placed in plaintiff's body by an abdominal operation. Two years later this tube was removed by another physician. The defendant had treated the wound but apparently had forgotten the tube because he failed to remove it. The testimony showed that the wound would not heal properly and that plaintiff had spent large sums in the treatment of this wound. The trial court found that the defendant was negligent and this decision was affirmed.

In the case of *Prewitt v. Philpot*[21] the plaintiff was operated on in a hot night in June. The windows in the operating room were left open and during the operation bugs got in the incision. The wound would not heal properly until the bugs were removed. There was no evidence that the windows were opened because of the heat, and that the heat was so great as to make it necessary to open the windows in order for the operation to be properly performed. The court held that in the absence of such proof a prima facie case of negligence had been set out.

Conclusion

Although the laws of malpractice have not been fully developed in Mississippi, the Court has established enough principles for an injured client to recover adequately against a physician in a case of malpractice. There are numerous dangers that must be avoided, but the dangers usually arise while attempting to establish the relation of employer and employee between a hospital and its staff. This situation generally arises when an attempt is being made to prove the physician is the employee of the hospital. In an attempt to aid one in avoiding this error, it has been shown that the proximate cause of the injury must be proved and, upon failure to prove it, the suit will fail. The doctrine of res ipsa loquitur can be used in certain instances to help the attorney prove his case.

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[16]Meridian Sanatorium v. Scruggs, 121 Miss. 330, 83 So. 532 (1920).
[17]General Benevolent Ass'n v. Fowler, 201 Miss. 578, 50 So.2d 137 (1951).
[18]55 So.2d 142 (Miss. 1951).
[19]An unrelated case to this topic is International Order of Twelve Knights and Daughters of Tabor in *Mississippi v. Barnes*, 204 Miss. 33, 37 So.2d 487 (1948). This case is interesting in that it shows the difficulty in proving that a charity hospital was negligent in hiring its employees.
[20]112 Miss. 306, 73 So. 49 (1916).
[21]142 Miss. 740, 107 So. 880 (1926).

The American Medical Association has taken steps to offer protection to a client in cases of irresponsible service, fee-splitting, bill padding, excessive fees, needless treatment, arrogance, carelessness, and the like. The Association has set up what is called a grievance committee.[22] Whenever a patient has a complaint, he presents this complaint to the committee and if it finds that such complain is justified, then appropriate action is taken against such physician.[23]

Ralph D. Pruett, Jr.

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[22]For a complete discussion on this: Alice Lake, *"The Doctors Clean House,"* The American Magazine, p. 18, August, 1951.

[23]For information on such a committee in Mississippi write:
Mr. Rowland Kennedy
Executive Secretary
Mississippi State Medical Association
Federal Building
Jackson, Mississippi.

RECENT DECISIONS

Adoption—Allowed Where Petitioners Were Believers in the Christian Science Religion

Petitioners sought to adopt a child who had lived with them for two years. The lower court denied the petition solely on the ground that petitioners were believers in the Christian Science religion. Held: Since petitioners had provided all necessary medical and surgical care for the child while in their custody and had declared under oath that they would provide such care whenever necessary, petitioners were entitled to the privilege of adopting the child. *Eggleston v. Landrum,* 210 Miss. 645, 50 So.2d 364 (1951).

Adoption, in legal contemplation, is the act by which the parties thereto institute the relationship of parent and child between persons not so related by nature.[1] The right of adoption was unknown to the common law of England and exists in this country only by virtue of statute.[2] Under these statutes, there is unanimous agreement that the paramount question to be considered in an adoption proceeding is the welfare and best interest of the child.[3]

The principle that the state, through its courts, may regulate and restrict, and entirely supersede if necessary, the natural right of a parent to the exclusive custody and control of his child is now firmly established.[4] In many jurisdictions, it is specifically provided by statute that a parent or other person obligated as such who wilfully omits, without lawful excuse, to furnish medical treatment for a child to whom the parental duty is owed shall be guilty of a crime.[5]

Christian Science is said to be "A system of healing disease of mind and body, which teaches that all cause and effect is mental, and that sin, sickness and death would be destroyed by a full understanding of the divine principle of Jesus' teaching

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[1] 1 Am. Jur., Adoption § 1.

[2] Miss. Code § 1269 (1942); Meeks v. Cornelius, 244 Ala. 532, 14 So.2d 145 (1943); McKeag's Estate, 141 Cal. 403, 74 Pac. 1039 (1904); Under these statutes, unfortunate children, whose parents, through adversity or the infirmities of their nature, are unable to care and provide for them are placed in wholesome surroundings under the care of persons willing and able to provide for their protection and comfort. *In re* Palmers Adoption, 129 Fla. 630, 176 So. 537 (1937); Spencer v. Franks, 173 Md. 73, 195 Atl. 103 (1937); *In re* Jaren, 223 Minn. 561, 27 N.W.2d 656 (1947); Menus v. Cogwell, 359 Mo. 697, 223 S.W.2d 412 (1949); Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1946); 1 Am. Jur., Adoption § 3.

[3] Miss. Code, *supra* note 1; McClure v. Williams, 201 Ala. 499, 78 So. 853 (1918); *In re* Taggart, 190 Cal. 493, 213 Pac. 504 (1923); Bilderback v. Clark, 106 Kan. 737, 189 Pac. 977 (1920); Forber v. Warren, 184 Miss. 526, 186 So. 329 (1939); *In re* Jackson, 55 Nev. 174, 28 P.2d 125 (1934); Betz v. Horr, 276 N.Y. 83, 11 N.E.2d 548 (1937); Magevney v. Karsh, 167 Tenn. 32, S.W.2d 548 (1933); Gomez v. Hernandez, (Civ. App.) 29 S.W.2d 843 (1930); 1 Am. Jur., Adoption § 4; 39 Am. Jur., Parent and Child § 20.

[4] Porter v. Porter, 60 Fla. 407, 53 So. 546 (1910); State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901); Risting v. Sparboe, 179 Iowa 1133, 162 N.W. 592 (1917); Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815 (1930); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); *In re* Badger, 268 Mo. 139, 226 S.W. 936 (1920); People v. Ewer, 141 N.Y. 129, 36 N.E. 4 (1893); State v. Kilvington, 100 Tenn. 227, 45 S.W. 433 (1898); 39 Am. Jur., Parent and Child §§ 15, 18.

[5] Miss. Code §§ 7185-02 (h), 7185-12, 7185-13 (1942); Bradley v. State, 79 Fla. 651, 84 So. 677 (1920); Clark v. State, 181 Miss. 455, 180 So. 602 (1938); Williams v. State, 207 Miss. 816, 43 So.2d 389 (1949); People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903); Owens v. State, 6 Okla. Crim. Rep. 110, 116 Pac. 345 (1911); 39 Am. Jur., Parent and Child § 113; *but see* Justice v. State, 116 Ga. 605, 42 S.E. 1013 (1902).

and healing; a form of mental therapeutics."[6] However opposed the teachings of Christian Science may be to the beliefs of others, they are founded on the religious convictions of those professing Christian Science, and the courts will not say that those persons are mentally unsound.[7]

Thus the question is raised as to whether or not the chancellor can consider those questions in an adoption proceeding for which the adoptive parents may later be convicted of a misdemeanor for neglecting to do.[8] In the subject case, the court did not have to decide the question since the petitioners stated under oath that they would provide such medical care whenever necessary. Furthermore, the court stated, "An enlightened society will not permit the great healing medium of modern medicine and surgery to be denied to children, regardless of the conscientious beliefs of their parents whether such parents be natural or adoptive."

It is submitted that under the rule in the subject case and in the light of sound public policy, an adoption will not be allowed where the petitioners' religious beliefs are such as to deny medical aid to the child, in the absence of proof by oath that such care will be given, regardless of the beliefs of the parents.

Frank J. Hammond, Jr.

Bankruptcy—Consent to Summary Proceeding in Bankruptcy by Participation on the Merits

Petitioner filed two claims against a bankrupt corporation, and the trustee of the bankrupt asserted a set-off and a counterclaim against him. After the case was heard on its merits, an adverse judgment was rendered against petitioner on the set-off and counterclaim, and, at this stage of the proceedings, petitioner objected to the jurisdiction of the court for the first time. Held: Petitioner, failing to object to the jurisdiction before the merits were determined and an opinion filed, consented to the court's jurisdiction. *In re Petroleum Conversion Corp.*, 99 F. Supp. 899 (D. Del. 1951).

The jurisdiction of a bankruptcy court to enforce in a summary proceeding the trustee's asserted right to property not in the actual or constructive possession of the court[1] depends on whether the adverse claim is substantial or merely colorable.[2] If the claim is substantial, a plenary suit is the only proper remedy in the absence of consent.[3]

In *Cline v. Kaplan*[4] the United States Supreme Court held that where the adverse claimant objected before final order to the summary proceeding, such objection was timely and that participation in the proceeding, without preliminary objection, did not amount to waiver or consent.[5] The Court rested its decision almost entirely on the case of *Louisville Trust Co. v. Comingor*.[6] However, such an interpretation was clearly refuted by a later judgment[7] of Chief Justice Fuller,

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[6]Webster's New International Dictionary, 2nd ed.; 14 C.J.S., Christian, p. 1115.

[7]*In re* Brush's Will, 35 Misc. Rep. 689, 72 N.Y. Supp. (1901).

[8]See *supra* note 5.

[1]Mitchell v. Mitchell, 59 F.2d 62 (1st Cir. 1932).

[2]Head v. Braimed, 5 F.2d 289 (9th Cir. 1925); Shea v. Lewis, 206 Fed. 877 (8th Cir. 1935).

[3]United States Fidelity & Guaranty Co. v. Sweeney, 80 F.2d 235 (8th Cir. 1935).

[4]323 U.S. 97 (1944).

[5]*Ibid.* at p. 100, "We reject the suggestion that respondents conferred consent by participation in the hearing on the merits. . . ."

[6]184 U.S. 18 (1903).

[7]First Nat. Bank v. Chicago Title & Trust Co., 198 U.S. 280 (1905).

who wrote the *Comingor case.* This case was not referred to in the *Cline* decision. It had seemed well settled, prior to *Cline v. Kaplan,* that participation on the merits in a summary proceeding, without specific jurisdictional objection, amounted to consent.[8]

In the subject case petitioner invoked the court's jurisdiction, thereby consenting to an adjudication,[9] not only of his own claims, but also of closely related transactions asserted by the trustee.[10] Nevertheless the court considered the possible effect of *Cline v. Kaplan.*[11] In the *Cline* case the hearing went to the issue of jurisdiction, and participation by the defendant was thus adequate to indicate his resistance to the summary proceeding before the merits were considered.[12] In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and, in that sense, the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds it cannot go further.[13]

If an objection to jurisdiction is not made by the adverse claimant prior to participation in a hearing on the merits, consent is waived. This is the doctrine of the subject case, based on a narrow reading of *Cline v. Kaplan.* Also Rule 12 (h)[14] of the FEDERAL RULES OF CIVIL PROCEDURE, which are generally applicable in bankruptcy, a matter not considered in the *Cline* case,[15] suggests the same result.[16]

To allow the petitioner to defend on the merits and then withdraw if he thinks the decision may go against him, not only causes more litigation thus diminishing the estate, but also places a premium on dilatory tactics.[17] To avoid such confusion and waste the subject case seeks to return to what the law was thought to be before *Cline v. Kaplan.*

N. Kelly McKoin

DOMESTIC RELATIONS—RIGHT OF PUTATIVE WIFE TO DIVISION OF PROPERTY ACCUMULATED DURING VOID MARRIAGE

Complainant married D in good faith, when D was in fact incapable of contracting legal marriage because of his prior existing marriage to another woman. While living with D as his wife, complainant assisted him in the accumulation of joint property. Held: Complainant was entitled to equitable

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[8] *In re* Tax Service Ass'n, 305 U.S. 160 (1938); MacDonald v. Plymouth Trust Co., 286 U.S. 263 (1932); Fairbanks Steam Shovel Co. v. Wills, 240 U.S. 642 (1916); First Nat. Bank v. Chicago Title & Trust Co., *supra* note 7; *In re* West Produce Corporation, 118 F.2d 274 (2nd Cir. 1941); *In re* Murray, 92 F.2d 612 (7th Cir. 1937); First State Bank v. Fox, 10 F.2d 116 (8th Cir. 1925); In Oglebay, *Some Development in Bankruptcy Law Regarding Summary Jurisdiction and the Determination of the Effect of Discharges,* 21 J.N.A. REF. BANKR. 18 (1946).

[9] Slocum v. Edwards, 168 F.2d 627 (2nd Cir. 1948); 2 COLLIERS, BANKRUPTCY p. 525 (14th ed. 1940).

[10] Mueller v. Nugent, *supra* note 6.

[11] "Summary jurisdiction, therefore, was apparently attacked in the *Cline* case before the adverse claimant had participated in any hearing on the merits." *Supra* note 4.

[12] Matter of White Satin Mills, 25 F.2d 313 (D.C. Minn. 1928); 2 COLLIERS, BANKRUPTCY, *supra* note 9.

[13] Louisville Trust Co. v. Comingor, *supra* note 6.

[14] Provides that all defenses not raised by preliminary motion or by answer are waived, with certain exceptions not important here.

[15] 28 U.S.C.A. 336 (1950).

[16] 21 J.N.A. REF. BANKR., *supra* note 8.

[17] Hall v. Goggin, 148 F.2d 774 (9th Cir. 1945); Note, *When May an Adverse Claimant Object to the Summary Jurisdiction of the Bankruptcy Court,* 39 ILL. L. REV. 174 (1944).

division of property accumulated by joint efforts while they were living together as man and wife. *Chrismond v. Chrismond,* 52 So.2d 624 (Miss. 1951), *cert. denied.*

While at common law no rights as a wife could be acquired as a result of a void marriage,[1] the majority of courts in this country have abrogated this harsh rule as in the subject case. Thus the general rule in this country has become that when a woman in good faith enters into a marriage with a man who is incapable of contracting marriage because of some impediment, the woman is entitled to a division of the property accumulated by the joint efforts of the parties during their relationship.[2]

There are several theories which the courts have employed in order to reach this result. Some courts have considered the relationship to be one of partnership, quasi partnership,[3] or joint adventure,[4] and thus have considered the property acquired by the partners as partnership property. Other courts have based the decision simply on the grounds that an equity court has inherent jurisdiction to order such a division and grant relief to the parties involved, and that it is just and equitable that the innocent party should so recover.[5] Again, some courts have analogized this situation to that where community property is involved,[6] even though in strictness no community property can exist without a valid marriage.[7] There is often no clear-cut distinction between the theories, however, as the courts have not felt compelled to choose one of the theories as a basis for their holdings to the exclusion of the others, they often discuss all of them as supporting the decision. Thus in the subject case it is difficult to determine on what grounds the court bases its decision, and the opinion lends itself only to speculation on this question. However, it would seem from the language employed by the court, to the effect that the equitable powers of the court are sufficient to protect the rights of the putative wife, that this court favors the "just and equitable" theory.

The question arises in connection with this case as to whether good faith on the part of the party seeking the division is a necessary element to recovery. The authorities are not in accord on this question, some courts holding that the element of good faith is controlling,[8] and others seeming to disregard this factor.[9] While this question was not presented to the Mississippi court in this case, the court in laying down the rule says that the equitable powers of the court are sufficient to protect the rights of the wife where the marriage

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[1]DeFrance v. Johnson, 26 Fed. 891 (C.C.D.Minn. 1886); Jenkins v. Jenkins, 2 Dana. 102 (Ky. 1834); Carpenter v. Smith, 24 Iowa 200 (1868); Price v. Price, 124 N.Y. 589, 27 N.E. 383 (1891); See Comment, 76 U. PA. L. REV. 439.

[2]35 AM. JUR. 216, Marriage § 53; *contra,* Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900); See AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI § 29 (1935).

[3]Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S.W. 246 (1902); *In re* Brenchley's Estate, 96 Wash. 223, 164 Pac. 913 (1917); Knoll v. Knoll, 104 Wash. 110, 176 Pac. 22 (1918).

[4]Bracken v. Bracken, 52 S.D. 252, 217 N.W. 182 (1927).

[5]Sclamberg v. Sclamberg, 220 Ind. 209, 41 N.E.2d 801 (1942); Werner v. Werner, 59 Kan. 399, 53 Pac. 127 (1898); Fuller v. Fuller, 33 Kan. 582, 7 Pac. 241 (1885); Buckley v. Buckley, 50 Wash. 213, 76 Pac. 1079 (1928); Leong v. Leong, 27 F.2d 582 (9th Cir. 1928), *cert. denied,* 278 U.S. 636 (1928) (theory of quasi contract).

[6]Schneider v. Schneider, 183 Cal. 335, 191 Pac. 533 (1921); Macchi v. LaRocca, 54 Cal. App. 98, 201 Pac. 143 (1920); Texido v. Merical, 132 Misc. 764, 230 N.Y. Supp. 605 (1928).

[7]Macchi v. La Rocca, *supra* note 6.

[8]Baker v. Baker, 222 Minn. 169, 23 N.W.2d 582 (1946); Vincent v. Moriarty, 31 App. Div. 484, 52 N.Y. Supp. 519 (1898); Knoll v. Knoll, *supra* note 3.

[9]Mitchell v. Fish, 97 Ark. 444, 134 S.W. 940 (1911); Bracken v. Bracken, *supra* note 4.

which she entered into in *good faith* was, in reality, void, thus seeming to indicate that this court would align itself with those jurisdictions which require good faith as an essential element to recovery.

This case is noteworthy chiefly because it is one of first impression in this state, and because it brings Mississippi within that group of courts which recognize the only rule on this question which can be reconciled with considerations of equity and reasonableness.

Nancy T. Wood

Escheat—Jurisdiction of Intangibles

Decedent, stockholder in the Standard Oil Company, had been dead for more than fourteen years when the state of New Jersey brought an action against Standard Oil to escheat unpaid dividends and stock still held in the name of the deceased by Standard Oil. From the decision in the state court, the Standard Oil Company appealed to the United States Supreme Court. *Held:* A state, place of residence of a corporation, can escheat intangible personal property in the form of stock and unpaid dividends without regard to the residence of the decedent. *Standard Oil Company v. State of New Jersey,* 341 U.S. 428 (1951).

Where a person dies intestate without lawful heirs or next of kin, his property escheats to the state by operation of law.[1] While at common law escheat did not apply to personal property,[2] statutes now make no distinction between realty and personalty.[3] Likewise the state now has the same dominion over intangible as it has over tangible property.[4] A state has uncontrolled jurisdiction of all property, real or personal, within its borders;[5] therefore every state has the power to determine for itself the conditions on which property situated within its territory may be acquired, enjoyed and transferred.[6]

Although it is frequently maintained that a debt has no situs anywhere,[7] situs of intangibles must be ascertained for certain purposes.[8] Since an escheat proceeding is in rem or at least quasi in rem,[9] the *res* must have its situs within the state taking jurisdiction.[10] There must be seizure of the *res* and reasonable notice to parties

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[1]*In re* Martin's Will, 95 N. Y. S.2d 260 (1949); Seitz v. Messerschmitt, 117 App. Div. 401, 102 N.Y. Supp. 732 (1907).

[2]Anderson National Bank v. Luckett, 321 U.S. 233 (1944); State v. Northwest National Bank of Minneapolis, 219 Minn. 471, 18 N.W.2d 569 (1945).

[3]*In re* Lindquist's Estate, 25 Cal.2d 697, 154 P.2d 879 (1944); State v. Kearns, 79 Mont. 299, 257 Pac. 1002 (1927); *In re* Martin's Will, 95 N.Y. S.2d 260 (1949); Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt,* 27 Harv. L. Rev. 107 (1913); 7 C.J.S., Escheat § 3.

[4]Security Savings Bank v. State of California, 263 U.S. 282 (1923).

[5]Moscow Fire Ins. Co. v. Bank of New York and Trust Co., 161 Misc. 903, 294 N.Y. Supp. 648 (1937); Brooklyn Borough Gas Co. v. Bennett, 154 Misc. 106, 277 N.Y. Supp. 203 (1935); Wilmer v. Wilmer, 82 Va. 890, 5 S.E. 536 (1888); 14 Am. Jur., Courts § 189.

[6]Pennoyer v. Neff, 95 U.S. 714 (1877); Moscow Fire Ins. Co. v. Bank of New York, *supra* note 5.

[7]*In re* Neely's Estate, 136 Me. 79, 1 A.2d 772 (1938); 27 Harv. L. Rev. 107 (1913); 30 C.J.S., Escheat § 3.

[8]Parker, Peebles and Knox v. National Fire Ins. Co., 111 Conn. 283, 150 Atl. 313 (1930); Connecticut Mutual Life Ins. Co. v. Moore, 297 N.Y. 1, 74 N.E.2d 24 (1947).

[9]United States v. Klein, 106 F.2d 213 (3rd Cir. 1939); Arizona Land and Stock Co. v. Markus, 37 Ariz. 530, 296 Pac. 251 (1931); 30 C.J.S., Escheat § 8.

[10]United States v. Klein, *supra* note 9.

concerned.[11] The Mississippi statute[12] on escheat provides for the escheat of real and personal property, tangible and intangible. There is a provision specifically providing for the escheat of property unclaimed for a period of years after liquidation of a bank,[13] but at present there is no Mississippi case involving jurisdiction of the state to escheat unclaimed stock.

The general rule is that the location of intangibles is the domicile of the owner.[14] This applies to personal property,[15] but not necessarily to escheated personal property.[16] Possession of bonds and stock certificates gives the court within whose territorial jurisdiction the possession is held power of control over the debt or property rights represented by them.[17] This idea has been supported on the theory that intangibles merge in the documents which represent them.[18] It has been held[19] that for purposes of attachment stock is located where the corporation is legally located. On the other hand cases have held that when a dividend is declared, it becomes a debt due from the corporation to the stockholder which follows the residence of the owner.[20] These cases do not allow the state where the debt is located to escheat property in the absence of a showing that stockholders were residents.[21]

There is nothing in the nature of jurisdiction as applied to courts which renders it exclusive,[22] but the court which first acquires lawful jurisdiction of specific property takes it from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit.[23] It should be noted, however, that in the subject case the court did not have before it a suit between states. It would seem that where the state directly benefits from the proceedings as in escheat, the jurisdictions in which suit could be brought should be limited so as to avoid a race for the property. Since it is sometimes impossible to ascertain the jurisdiction of the absent owner, the view followed by the United States Supreme Court allowing the jurisdiction of the debtor to escheat unclaimed intangibles would seem to be the better rule.

Shirley Norwood

Federal Jurisdiction: Party Removing to Federal Court not Estopped from Seeking Remand to State Tribunal

Plaintiff joined two foreign corporations and a resident of his own state in an action which was brought in the state court. The action was removed to the United States District Court on the joint petition of the two corporate defendants. The district court entered a judgment for the plaintiff and the judgment was affirmed by the United States Court of Appeals. Certiorari was granted on the ground that the district court never had jurisdiction. Held: The defendants were not estopped from protesting that there was no right of removal even though

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[11]Security Savings Bank v. State of California, *supra* note 4; Schultz v. Schultz, 254 Wis. 139, 40 N.W.2d 515 (1949).

[12]Miss. Code § 480 *et seq.* (1942).

[13]Miss. Code § 5258 (1942).

[14]*In re* Rapoport's Estate, 217 Mich. 291, 26 N.W.2d 777 (1947).

[15]*In re* Rapoport's Estate, *supra* note 14; *In re* Lyon's Estate, 175 Wash. 115, 26 P.2d 615 (1933).

[16]*In re* Lyon's Estate, *supra* note 15.

[17]Hutchinson v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933).

[18]*In re* Fidelity Ass'n, 129 F.2d 442 (4th Cir. 1942).

[19]Partch v. Adams, 55 Cal. App. 1, P.2d 244 (1942).

[20]*Re* Hull Copper Co., 46 Ariz. 270, 50 P.2d 560 (1935).

[21]*Re* Hull Copper Co., *supra* note 20.

[22]United States v. Bank of New York, 296 U.S. 463 (1935).

[23]Harkin v. Brundage, 276 U.S. 36 (1927); Lion Bonding and Surety Co. v. Karatz, 262 U.S. 77 (1933); 14 Am. Jur., Courts § 245.

petitioners were the parties invoking federal jurisdiction. *American Fire and Casualty Co. v. Finn,* 71 S. Ct. 534 (1951).

Historically, the earliest views of the Supreme Court held that mere consent of the parties did not confer jurisdiction on a federal court[1] and that the court was quite careful in keeping the jurisdiction of the federal system within its prescribed limits, and, in such cases, would make exceptions to the rule that the court would not allow a litigant to fall back on any matter for reversal which originally operated for his advantage.[2]

At the turn of the century the court took an opposite view and held that the removal of a cause into a federal court by a defendant acts as a waiver of any right he may have had to have the matter decided by a state tribunal and that he is thereafter estopped from contesting the right of the federal court to decide the case.[3] This rule was universally followed[4] until the present case,[5] although some authorities still felt that the earlier rule was the better one.[6]

The court held that the statute in question[7] was directory and not mandatory and based its decision primarily on its interpretation of the statute. The court felt that the purpose of the statute[8] is to limit removal of cases from state courts and that it is the duty of the Supreme Court to guard against expansion of jurisdiction of federal courts by judicial interpretation or by consent of the parties to the suit.[9] It may be seen that both precedent[10] and the statute[11] are easily made to conform with the rule set out by the court or, on the other hand, another interpretation of the statute as expressed by the dissent[12] leads to the opposite conclusion, and it too is backed by precedent.[13]

It would seem that the latest rule set out by the court in the present case[14] completely dispenses with the idea that one who invokes federal jurisdiction and as a result suffers the consequences of a judgment should not be heard to complain.[15] The question of whether or not an objection to federal jurisdiction is based on a mere irregularity, which may be ignored and federal jurisdiction retained, is left by the statute[16] to the jurisdiction of the court. Just what constitutes a mere irregularity may be expected to vary from one decision to the next, but the court

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[1]People's Bank of Bellvue v. Calhoun, 102 U.S. 256, 260-261 (1880); Torrance v. Shedd, 144 U.S. 527 (1890); Martin v. Snyder, 148 U.S. 663 (1893).

[2]Mansfield C. & L. M. R.R. v. Swann, 111 U.S. 379, 383 (1884); Wabash R.R. v. Barbour, 73 Fed. 516 (1891).

[3]Baggs v. Martin, 179 U.S. 206 (1900).

[4]Toledo, St. L. & W. R.R. v. Perencho, 205 Fed. 472 (7th Cir. 1913); Handley-Mack Co. v. Godchaux Sugar Co., 2 F.2d 435 (6th Cir. 1924); Bailey v. Texas Co., 47 F.2d 153 (2nd Cir. 1931).

[5]American Fire and Casualty Co. v. Finn, 71 S. Ct. 534 (U.S. 1951).

[6]Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928).

[7]62 Stat. 937 (1948), 28 U.S.C. § 1441 (c) (1948).

[8]62 Stat. 937 (1948), 28 U.S.C. § 1441 (c) (1948).

[9]Torrance v. Shedd, 144 U.S. 527 (1890), Comment, HARV. L. REV. 1048 (1928).

[10]People's Bank of Bellvue v. Calhoun, *supra* note 1.

[11]The dissent felt that any requirements for federal jurisdiction which this case did not meet were no more than mere irregularities and that the federal court should retain jurisdiction since the petitioner originally invoked it.

[12]62 Stat. 937 (1948), 28 U.S.C. § 1441 (c) (1948).

[13]Baggs v. Martin, *supra* note 3; Toledo St. L. & W. R.R. v. Perencho, *supra* note 4; Handley-Mack Co. v. Godchaux Sugar Co., *supra* note 4; Bailey v. Texas Co., *supra* note 4.

[14]American Fire & Casualty Co. v. Finn, *supra* note 5.

[15]Baggs v. Martin, *supra* note 3.

[16]62Stat. 937 (1948), 28 U.S.C. § 1441 (c) (1948).

made one point certain, the party originally invoking federal jurisdiction is not estopped from protesting that there was no right of removal from the state court even though he sought such removal.

Neil W. White

TORT—LIABILITY OF CHARITY HOSPITAL FOR SERVANT'S NEGLIGENCE

Action was brought by the survivors for the death of a paying patient at the defendant hospital whose employee technician caused death by negligently mislabeling blood used in a transfusion. HELD: The charity hospital was liable for the employee's negligence although it was not negligent in employing him. *Mississippi Baptist Hospital v. Holmes,* 55 So.2d 142 (Miss. 1951).

The holding of the subject case is directly opposed to the Mississippi rule heretofore prevailing, which was that the only remedy of a patient injured in a charity hospital by the negligence of an employee was against such employee.[1]

Views similar to the former Mississippi holding have been common in this country since the case of *McDonald v. Massachusetts General Hospital,*[2] which purported to follow an older English case.[3] Courts applying the doctrine of immunity have done so in such a manner as to give widely different results, dependent upon fine distinctions difficult of application.[4]

The variations of immunity grow out of the different theories used as the bases for the immunity doctrine. For example, Illinois, applying the theory that payment of judgment claims in suits for the negligence of servants would improperly divert trust funds from the purpose intended, once held immunity as to both recipients of charity and strangers,[5] the theory of the *McDonald* case, *supra.* Arizona, until very recently,[6] chose to deny recovery to beneficiaries of charities, even if the beneficiary was a paying patient, considering it best public policy to grant such exemption.[7] Wisconsin gives immunity as to both patients and strangers, applying the theory that the doctrine of *respondeat superior* does not apply because the charity is operating to help the public and not for profit.[8] Other jurisdictions have granted immunity from suits by direct recipients by implying a wavier of liability for negligence.[9]

Upon what sound basis can these cases and arguments be upheld? The subject case examines and adequately refutes each of them. The states applying the trust

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[1]International Order of Twelve Knights and Daughters of Tabor of Mississippi v. Barnes, 204 Miss. 333, 37 So.2d 487 (1948); Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Pace v. Methodist Hospital, 130 So. 468 (Miss. 1930).

[2]120 Mass. 432, 21 Am. Rep. 529 (1876).

[3]Heriot's Hospital v. Ross, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846).

[4]Appleman, *Tort Liability of Charitable Institutions,* 22 A.B.A.J. 48 (1936) (extensive classification of liability in each jurisdiction).

[5]Hogan v. Chicago Lying-In Hospital, 335 Ill. 42, 166 N.E. 461 (1929); Johnson v. City of Chicago, 258 Ill. 494, 101 N.E. 960 (1913); Tollefson v. City of Ottawa, 228 Ill. 134, 81 N.E. 823 (1907); Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991 (1905).

[6]Ray v. Tucson Medical Center, 72 Ariz. 22, 220 P.2d 810 (1951).

[7]Southern Methodist Hospital v. Wilson, 45 Ariz. 507, 46 P.2d 118 (1935).

[8]Bachman v. Y.W.C.A., 179 Wis. 178, 191 N.W. 751 (1922); Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1915).

[9]Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P.2d 489 (1938); Mikota v. Sisters of Mercy, 183 Iowa 1378, 168 N.W. 219 (1918); Bruce v. Y.M.C.A., 41 Nev. 372, 277 Pac. 798 (1929).

fund theory concede liability for negligent employment of servants.[10] Is this not inconsistent with the trust fund theory? Does this not divert the trust fund to undesigned purposes also? There is no reason for regarding the doctrine of *respondeat superior* as inapplicable to charity hospitals;[11] but if it be so regarded there would be immunity even for negligent selection of servants, which is further than courts purporting to hold such inapplicability are willing to go.[12] To imply that the patient waives liability is usually to contradict the facts.[13] The Court, in the subject case, says that in most cases there would be no consideration to support the waiver, and often the patient is in such condition as to be incapable of contracting. Best public policy seems to be that charity hospitals, just as other corporations, should be held liable for the negligence of their employees. There is no reason why one injured by the negligence of the employees of such a hospital should suffer without compensation in order that hospital funds may be applied to relieve the suffering of another. There is no need for any funds to be lost; liability insurance offers protetcion to charity hospitals against judgments as granted in the subject case.

The policy of many states is to give charity hospitals no immunity, and the present trend is toward the extension of such liability.[14]

Robert H. Hodges

Tort—Personal Immunity May Not Be a Defense Under Mississippi Wrongful Death Statute

Stepdaughter of the defendant sought damages against him under the Mississippi wrongful Death Statute,[1] for the alleged shooting and killing of her mother. Held: Though the mother, had she survived, would not have been able to maintain an action against her husband, the plaintiff's right of action was entirely independent of the mother's disability where the husband was chargeable with a wrongful act. *Deposit Guaranty Bank & Trust Co. v. Nelson,* 54 So.2d 476 (Miss. 1951).

The case indicates a trend away from earlier decisions decided by the Supreme Court of Mississippi.[2] However, this view is in line with a minority of the jurisdictions which have dealt with similar circumstances.[3] The majority view is that

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[10]See note 4 *supra.*

[11]Georgetown College v. Hughes, 130 F.2d 810 (1942).

[12]See note 4 *supra.*

[13]Zollman, *Damage Liability of Charitable Institutions,* 19 Mich. L. Rev. 395 (1921).

[14]Georgetown College v. Hughes, *supra* note 11; Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Ray v. Tucson Medical Center, *supra* note 6; Durney v. St. Francis Hospital, 83 A.2d 753 (Del. 1951); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344 (1940); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Haynes v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28 (1937); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912). But see Williams v. Union County Hospital Ass'n, 234 N.C. 536, 67 S.E.2d 662 (1951); Bond v. City of Pittsburgh, 378 Pa. 404, 84 A.2d 328 (1951).

[1]Miss. Code § 1453 (1942).

[2]Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1932); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).

[3]Kazorowski v. Kalkonsinki, 321 Pa. 438, 184 Atl. 663 (1936); Robinson's Adm'r v. Robinson, 188 Ky. 49, 220 S.W. 1074 (1920); See 31 Ill. L. Rev. 796 (1937).

a wife[4] or a husband[5] or their children[6] could not sue one another for any personal tort. Such decisions are based on the theory, primarily, that to allow such suits would disturb the peace and tranquility of the home.[7]

Historically, the common law rule was that personal tort actions died with the person of the plaintiff or the defendant.[8] With the passage of the Fatal Accidents Act of 1846,[9] better known as Lord Campbell's Act, the rule was abrogated to some extent. The Act created a new cause of action for the death in favor of decedent's personal representatives for the benefit of certain designated persons.[10] A statutory remedy, based on Lord Campbell's Act, is provided for by every American state.[11]

Under a liberal construction of the Mississippi statute, the subject case stands for the proposition that the disability of the wife to sue is one which is personal to her alone and does not inhere in the tort itself.[12] The circumstances attending the injury and the nature of the wrongful act or omission are the basis of the action *under the statute* and not the nature of the loss or injury sustained or the person entitled to recover.[13] Where deceased would have been barred because of the lack of a wrongful act on the part of the one causing the death, his survivor would likewise be barred.[14]

The subject case seems to conflict with the leading case of *Austin v. Austin*.[15] Under that decision the right to sue was denied on the ground that since the spouse, who was injured or killed, could not sue, anyone claiming derivatively through the deceased spouse could not have a right of action.[16] The subject case states that the question of immunity depends upon the nature of the wrongful act and is not concerned with the person entitled to recover. However, the *Austin* decision was not expressly overruled by this case.

In view of the past decisions the result of the subject case is a desirable one. It is admitted that the only basis for the denial of a plaintiff's cause of action in such a case is to preserve the tranquility of the home. Does not this reason fail when there is no tranquility in the home? Is there any tranquility to be preserved in this case? Why should a rule still be applied when it has no foundation in reason, when the reason is non-existent?

Nevertheless, there is a great deal of confusion as to the interpretation of the wrongful death statute. As a consequence of this judicial confusion, it would be ideal for the Mississippi Legislature to designate, in definite language, who is entitled to maintain an action under this statute.

N. Kelly McKoin

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[4]Austin v. Austin, *supra* note 2; H. L. Austin v. Maryland Casualty Co., 105 So. 551 (Miss. 1925); Schubert v. Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Wilson v. Barton, 153 Tenn. 250, 283 S.W. 71 (1926).

[5]Broaddus v. Wilkerson, 286 Ky. 601, 136 S.W.2d 1052 (1940); Baker v. Bolton, (1808) 1 Camp. 493, 170 Eng. Rep. 1033.

[6]Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).

[7]Dishon's Adm'r v. Dishon's Adm'r, 187 Ky. 497, 219 S.W. 794 (1920); see note 2 *supra;* Broaddus v. Wilkerson, *supra* note 5.

[8]Wingfield, *Death As Affecting Liability in Tort,* 29 Col. L. Rev. 239 (1929).

[9]9 & 10 Vict. C. 93 (England 1846).

[10]Prosser, Torts § 103 (1941).

[11]See note 10 *supra.*

[12]Kazarowski v. Kalkonsinki, *supra* note 3.

[13]See note 10 *supra; see note 3 supra.*

[14]Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 791 (1944); Kirkpatrick v. Ferguson-Palmer Co., 116 Miss. 874, 77 So. 803 (1918).

[15]Austin v. Austin, *supra* note 2.

[16]See note 2 *supra;* see note 4 *supra.*

RECENT BOOKS

A Handbook of Banking Law. By J. T. Brown. Jackson, Mississippi, Mississippi Bankers Association, 1951. pp. 741. $12.50.

J. T. Brown is eminently qualified as an author on the subject of banking law by many years of practical experience as an officer of one of Mississippi's largest banks, by a distinguished career as an attorney, by several terms of service in the legislature, and by his knowledge of both Mississippi and federal statutes which affect the field of banking.

The acts of the 1950 legislature of Mississippi and the federal statutes up to January, 1950, are included in this work. In the foreword the author observes:

> "Perhaps no statute enacted by the Legislature of this State during its entire history was so carefully thought out and planned as the Banking Act of 1934. It had its beginning in 1932 during the dark days of the great depression. . . . Twenty-six suggestions were included in the report under the heading 'General Recommendations,' and the Legislature with commendable accuracy and a most unusual manifestation of complete cooperation, enacted practically every one of the recommendations into law."

The first part of the work is devoted to Mississippi statutes affecting Banks and Banking. Beginning with the creation of the Banking Department in 1934, all of the statutes enacted by our State Legislature through 1950 are cited and indexed. Included in the compilation are separate chapters covering such uniform acts as those on Negotiable Instruments, Warehouse Receipts, Stock Transfers and Trust Receipts.

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We recommend this volume with the admonition that bankers should not attempt to construe the state and federal statutes to certain facts as their conclusions probably would not be so sound as those reached in Mr. Brown's opinions. In the application and interpretation of these statutes the services of an attorney will be needed.

The codification of the banking statutes of the State of Mississippi and the Federal Government by this outstanding author will be a guide to the bankers and bar of our state, and will provide a ready reference to both the state and federal statutes. It will give the law from which may be formed an opinion, which, we trust,

will be as sound as those samples which were collected and published by the learned author. Certainly this volume deserves a place on the library shelf of every bank and attorney in the state.

*Gibson B. Witherspoon**

INCOME TAX TREATMENT OF LIFE INSURANCE PROCEEDS AND OTHER TAX ARTICLES.

By William J. Bowe. Vanderbilt University Press, 1951. pp. 90. $2.10.

Once again, Professor Bowe has written a little book that will prove of great value to the estate planner, whether he be an insurance man, a lawyer, or an accountant. Two-thirds of the book is concerned directly with life insurance tax problems. The remaining one-third is devoted to a discussion of the saving of death taxes through lifetime gifts and the cash and accrual methods of income tax accounting.

The author's clear and concise style makes the most complicated life insurance tax problems easy to understand. He shows how the tax law may help or hinder the tax adviser, depending upon how careful the latter is in planning the estate of his clients. Thus, there are definite "tax saving possibilities within the family if insurance is purchased on the lives of others,"[1] rather than on the purchaser's own life. On the other hand, he warns that "life insurance proceeds, even when paid by reason of death, are not necessarily excluded from taxable income."[2]

One of the most interesting problems discussed by Professor Bowe is the extent to which the estate planner may have to reckon with his client's business affairs. For example, a corporation may purchase "key-man insurance" on the lives of its executives to protect itself against loss by reason of the death of any one of them. At the same time, in the typical closed corporation of, say, three major stockholders, it may be desirable to have a survivor-purchase agreement. Under such an agreement, the stockholders agree that the corporation should redeem the shares of any one of them who should pass away, thereby avoiding the introduction of an outsider. Proceeds from insurance on the life of the deceased stockholder will provide the necessary funds to buy up the stock. The stockholder's family will be provided for by way of the proceeds from the sale of the stock to the corporation. Professor Bowe points out that "the plan of corporate ownership of all the insurance [i.e., both the 'key-man insurance' and the latter 'business liquidation insurance.'] may result in a total loss of the income tax benefits of key-man insurance,"[3] since an individual, rather than a corporate, purpose is being served in the stock redemption. Under these circumstances, he suggests that the estate planner should see that the business liquidation insurance is provided for "by an agreement between the individual stockholders and . . . secured by individually-owned insurance."[4]

It is this type of advice which the reader will find especially helpful. Like Professor Bowe's earlier books,[5] this is a *must* for anyone concerned with estate planning.

*Harold G. Wren**

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*Attorney at Law, Meridian, Mississippi; Past President, Mississippi State Bar.

[1] p. 47.

[2] p. 34.

[3] p. 60.

[4] p. 60.

[5] *Tax Planning for Estates* (Vanderbilt University Press, 1949) and *Life Insurance and Estate Tax Planning* (Vanderbilt University Press, 1950).

*Former Associate Professor of Law, University of Mississippi. (Now doing Graduate Work at Yale University Law School.)

THE POLITICAL ROLE OF THE GENERAL ASSEMBLY. By H. Field Haviland, Jr. New York, Carnegie Endowment for International Peace, 1951. pp. 190. $2.75.

This work is one which should be of particular interest to every student of International Law. The author, H. Field Haviland, Jr., has dealt with his subject in a rather complete but concise manner and presents an interesting picture of the development and function of the political power and influence of the General Assembly.

The author devotes the early part of this work to a study of the forces which shaped the Assembly's position in the political field. In the first section we are taken back to Dumbarton Oaks and San Francisco and are presented the conflicting views of the nations as to the composition, procedure and power of this body.

Section Two of this work deals with the Assembly in action. Here we are given an insight into the procedure in the Assembly, the method of handling various problems presented, and, in general, an examination of five years of Assembly experience in the political field.

The third section of this study is devoted to the types of action which the Assembly has developed as tools with which it seeks to attain various objectives. These tools are listed as the investigative power of the Assembly, the authority to recommend procedures of pacific settlement, and recommendation of policy and promotion of compliance.

The author, after giving us an insight into the background and formation of the Assembly and then presenting the methods of procedure and operation and the tools with which the Assembly works, finally examines some of the problems which have been presented to the Assembly in the political field. He deals with decisions of the Assembly in connection with specific situations or those which affect limited sectors of the international community. These problems appear to be the most numerous. The author also considers those problems presented to the Assembly which affect the entire community of nations. Another discussion relates to the efforts of the Assembly to influence the Security Council; to strengthen its own role in the political field to compensate for the failure of the Security Council to act on certain issues; and to strengthen its administrative procedures.

Included in this book is a list of the 22 major issues which have confronted the Assembly along with the resolutions adopted to deal with these issues.

The author presents his conclusions and points out certain defects in the functions of the Assembly but feels that the Assembly has proved itself to be an instrument sensitive to the needs of the majority of the nations and that it is capable of development in order to attain the purposes and principles desired by that majority.

Though this work is principally one for study, it is not so written that it cannot be enjoyed especially by those interested in the field of International Law. It is clearly written, readily understandable, and the development of the subject is extremely good.

*Harry L. Corban**

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*Member of the firm of Corban and Corban, Fayette, Mississippi.

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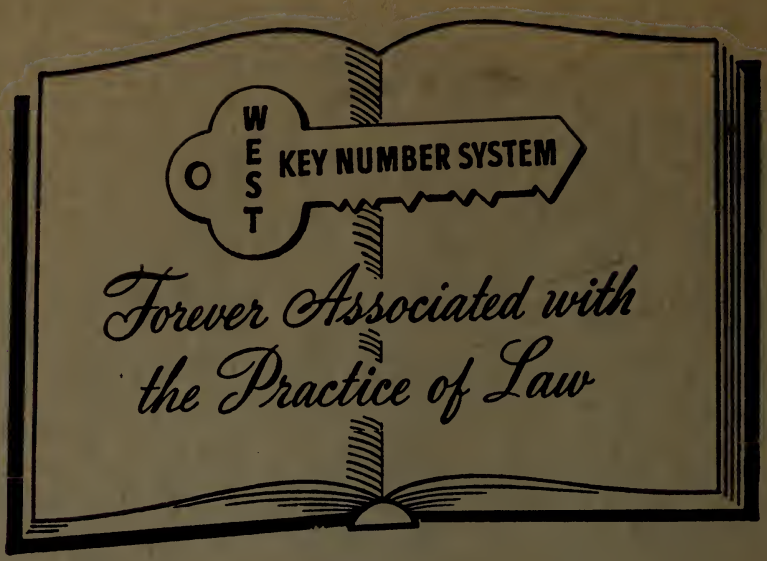

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